(19,226.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 185.

SAMUEL McMILLEN, RONALD MORRISON, AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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1 UNITED STATES OF AMERICA:

Be it remembered, that at the August term, A. D. 1897, of the district court of the fifth judicial district of the State of Colorado, held within and for the county of Lake, commencing on Monday, the 2d day of August, A. D. 1897, begun and held in the city of Leadville, county of Lake and State of Colorado, at the court house therein,

Present: Hon. Frank W. Owers, judge of said court. L. R. Thomas, Esq., district attorney. P. H. Harrington, Esq., bailiff of said court. T. F. O'Mahoney, Esq., sheriff of Lake county. John H. Dunn, Esq., clerk of said court.

The following, among other proceedings, were had, to-wit:

2 Be it remembered, that heretofore and on, to-wit, the 4th day of December, A. D. 1899, it being one of the regular juridical days of the December term, 1899, of said court, the following proceedings, *inter alia*, were had and entered of record, in said court, to-wit:—

SAMUEL MCMILLEN ET AL.
vs.
THE FERRUM MINING COMPANY. } 5031.

At this day comes Charles Cavender, Esq., one of the attorneys of this court, and hereby enters his appearance for and on behalf of the defendant herein.

Thereupon it is ordered by the court that this case be and the same hereby is set for trial on February 7th, 1900.

Thereupon the hearing on the application to inspect the minute books of the defendant company is set for December 11th, 1899.

And afterwards, and on, to-wit, the 7th day of February, A. D. 1900, it being one of the regular juridical days of the December term, 1899, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to-wit:

SAMUEL MCMILLEN ET AL.
vs.
THE FERRUM MINING COMPANY. } 5031.

At this day come the plaintiffs herein by George R. Elder, Esq., their attorney, and come the defendant by Messrs. Ewing and Cavender, its attorneys. Thereupon comes a jury, to-wit: Silas McPhee, Edward O'Brien, James McMordie, Bernard Becker, E. R.
3 Evans, John A. Bowler, Alex Shaw, C. E. Blosfeld, Frank E. Brown, John C. Clemons, Thomas Bates, L. M. Smith, twelve

good and lawful men. And they are duly selected and tried, empaneled and sworn, to well and truly try the issues herein joined, and a true verdict render according to the law and the evidence.

Thereupon the court orders that witnesses to any material fact be limited to four.

To which ruling of the court plaintiffs except.

Thereupon the motion of plaintiffs that jury be instructed to view the premises in controversy is denied.

To which ruling of the court plaintiffs except.

Thereupon the hearing of the evidence herein not being concluded at the hour of adjournment, the further hearing of same is continued until February 8th, 1900.

And the said jurors, being each duly cautioned by the court not to converse among themselves nor with others touching the matters at issue herein, nor to listen to such conversation of others, nor to read nor hear read, any publication bearing on the same, are permitted to separate to meet the court at its next incoming.

And afterwards, and on, to-wit, the 8th day of February, 1900, it being one of the regular juridical days of the December term, 1899, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to-wit:—

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH
vs.
THE FERRUM MINING COMPANY. } 5031.

4 At this day come again the said parties by their attorneys respectively. And the said jurors being now all here present and in the jury box the trial of the issues herein joined is resumed.

And the said jurors having heard the evidence produced as well on behalf of said plaintiffs as of the said defendant, and the argument of counsel, and being duly instructed by the court, retire to their room in charge of a sworn bailiff to consider of their verdict herein.

And on this same day come again the said parties by their attorneys respectively, And thereupon the said jurors being now here present and in the jury box, on their oaths say:

"We the jury find the issues herein joined for the defendant, and that it is the owner of and entitled to the possession of the premises set forth and described in its answer herein as the Golden Rod Lode mining claim.

February 8th, A. D. 1900.

(Signed) LEONARD M. SMITH, *Foreman*."

To which verdict of the jury plaintiffs then and there except.

Thereupon it is considered, ordered, adjudged and decreed by the court, that said defendant, The Ferrum Mining Company, do have

and recover of and from the said plaintiffs, Samuel McMillen, Ronald Morrison and Eben Smith, the premises in controversy herein as described in the answer of said defendant, and known as and called the Golden Rod Lode mining claim, situate on Breece hill, California mining district, Lake county, State of Colorado, and have and recover of and from the said plaintiffs, its costs in this behalf laid out and expended, to be taxed, and let execution issue therefor.

To which judgment of the court plaintiffs then and there except. Thereupon plaintiffs pray an appeal to the supreme court of the State of Colorado, which is granted upon condition plaintiffs file a good and sufficient bond in the sum of $500.00, with sureties to be approved by the clerk, in thirty days. Time and sixty days is allowed plaintiffs in which to tender their bill of exceptions.

STATE OF COLORADO, *Lake County,* } ss:

In the District Court of the Fifth Judicial District of Colorado in and for the County of Lake.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Plaintiffs,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Defendant. } Summons.

The People of the State of Colorado to the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff-, in the district court of Lake county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint; and if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinabove specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought by plaintiffs who pray judgment for the restitution of the premises as described in the complaint, for the sum of five hundred dollars damages, together with the sum of two hundred dollars expended in support of the adverse claim, and for costs of this suit, as will more fully appear from the complaint in said action to which reference is here made; and a copy of which is hereto attached.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff- will apply for judgment by default against you according to the prayer of said complaint.

Given under my hand and the seal of said court in said county, this 20th day of November A. D. 1897.

(Signed) JOHN H. DUNN,
Clerk of District Court,
[OFFICIAL SEAL.] By JAMES J. CONNELL,
Deputy Clerk.

(Endorsed.)

STATE OF COLORADO, } ss:
Lake County, }

I do hereby certify that I have duly served the within summons together with a copy of the complaint in the within stated action on this 22d day of November A. D. 1897 at Leadville in said county and State, by personally delivering to and leaving with R. B. Estey, president of the said The Ferrum Mining Company, the said defendant, personally, in the county of Lake, a copy of said summons, together with a copy of the complaint in the action therein
7 mentioned, thereto attached.

JAMES W. IVES, *Sheriff,*
By RALPH G. COMINGS, *Deputy.*

No. 5031. Summons. Lake county district court. S. McMillen *et al.*, plaintiffs *vs.* The Ferrum M. Co. defendant.

STATE OF COLORADO, } ss:
County of Lake, }

Office of the sheriff of said county.

Received Nov. 20th, 1897,

JAMES W. IVES, *Sheriff.*

Sheriff's Fees.

Service	$ .75
Mileage	.40
Return	
Total	$1.25

Filed this 22d day of Nov. A. D. 1897.

JOHN H. DUNN, *Clerk,*
By JAMES J. CONNEL, *Deputy.*
PHELPS PENDERY,
Att'y for Plaintiffs.

8 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court of the Fifth Judicial District in and for said County and State.

SAMUEL McMILLEN, RONALD MORRISON, EBEN SMITH, Plaintiffs,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Defendant. } No. 5031.

Amended Complaint.

And now come the plaintiffs herein by their attorney George R. Elder, and by leave of court first had and obtained file this their amended complaint, and complain and allege:—

That the defendant The Ferrum Mining Company is a corporation duly organized and doing business under and by virtue of the laws of the State of Colorado;

That on the 30th day of May, A. D. 1893, John Kennedy, a citizen of the United States over the age of twenty-one years, entered upon the unoccupied mineral domain of the United States and discovered and located the "Eulalia" Lode mining claim, the said claim being 1500 feet in length and 300 feet in width;

That previous and prior to the location and recording of the said "Eulalia" Lode mining claim, the said John Kennedy complied with the laws of the United States, the laws of the State of Colorado and the rules and regulations of miners in the California mining district, Lake county, Colorado, with reference to discovery, location and appropriation of the said Eulalia Lode mining claim upon the public mineral domain of the United States.

9 That the said "Eulalia" Lode mining claim is situated upon Breece hill in California mining district, county of Lake and State of Colorado;

That in the discovery, location and record of the said Eulalia Lode mining claim the said John Kennedy acted and was the agent of Samuel McMillen one of the plaintiffs herein and one John McCombe, and that afterwards and by good and sufficient deed of conveyance the interest and title of the said John Kennedy became vested in and was the property of the said Samuel McMillen and the said John McCombe;

That afterwards by good and sufficient deed of conveyance the plaintiff herein Eben Smith acquired an undivided one twelfth interest in and to the said Eulalia Lode mining claim;

That afterwards by good and sufficient deed of conveyance the plaintiff herein, Ronald Morrison, acquired an undivided one sixth interest in and to the said Eulalia Lode mining claim;

That afterwards the interest of the said John McCombe became

by due process of law forfeited to and vested in the said plaintiff, Samuel McMillen;

That the plaintiff herein, Samuel McMillen, is the owner of an undivided three-fourths interest in and to the Eulalia Lode mining claim;

That the said Eulalia Lode mining claim is described in the certificate of location thereof and as recorded in the clerk and recorder's office of Lake county, Colorado, as follows:

Beginning at corner No. 1, a pine post being identical with
10 cor. No. 1 of survey No. 427, Winter lode. Thence N. 12° 30′ E. 300 feet to cor. No. 2, a pine post; thence N. 77° 30′ W. 750 ft. to side center stake 1500 feet to cor. No. 3 a pine post; thence 12° 30′ W. 300 feet to cor. No. 4, a pine post; thence S. 77° 30′ E. 750 feet to side center stake 1500 feet to cor. No. 1, place of beginning. Variation 14° 40′ east. This claim is situate on Breece hill adjoining claims U. S. surveys No. 427, No. 538, No. 471 and No. 504;

That the surveyed and located lines of the said Eulalia Lode mining claim were identical with the surveyed and located lines of the Winter lode, United States survey No. 427;

That the said John Kennedy, agent as aforesaid, for the plaintiff herein, Samuel McMillen, and one John McCombe, claimed, occupied and took possession of the Eulalia Lode mining claim, and the ground contained within its surveyed limits as the abandoned and forfeited ground of the Winter Lode mining claim U. S. survey No. 427, and adopted and claimed the original lines and limits of the said Winter lode as the lines and limits of their re-location of the abandoned and forfeited mineral land of the United States, as the Eulalia Lode mining claim;

That the said John Kennedy and the plaintiff herein, Samuel McMillen, by proper legal proceedings to that end made and prosecuted, secured the cancellation in the United States land office by order and finding of the Commissioner of the General Land Office, of the application for patent for the Winter lode, U. S. survey No. 427, application No. 279, and procured the same at their own costs and charges;

That in procuring the said cancellation of the said application for patent for the Winter lode, the said plaintiff herein, Samuel McMillen, expended large sums of money for office fees, attorneys'
11 fees, court costs and witness fees, in hearings before the land officers.

That the plaintiffs herein are the owners of the said Eulalia Lode mining claim by virtue of good and sufficient deeds of conveyance from the said John Kennedy, the locator of the said Eulalia Lode mining claim;

That on the 30th day of May, A. D. 1893, the said John Kennedy was the owner and in actual occupation of the Eulalia Lode mining claim, 1500 feet in length by 300 feet in width, situate in California mining district, Lake county, State of Colorado;

That the plaintiffs, each and all of them, are citizens of the United States over the age of twenty-one years;

And plaintiffs allege that they and their grantors have expended in work, labor and improvements upon the said Eulalia Lode mining claim, the full sum of five hundred dollars in the erection of buildings, sinking of shafts, running of drifts and upraises;

That the plaintiffs herein claim the legal right to occupy and possess the said Eulalia Lode mining claim, and all the lodes, ores, rock, mineral and ore deposits within the lines of said claim, and are entitled to the possession thereof by virtue of a full compliance by themselves and their grantors with the laws of the United States and the State of Colorado and the local laws and rules of miners in said California mining district by preemption, discovery, location, purchase and by actual prior possession as a lode mining claim, located upon the public domain of the United States, and by the relocation and appropriation of the said premises as an abandoned and forfeited claim, in accordance with the laws of the United States and of the State of Colorado;

12 That on or about the 20th day of August, A. D. 1897, the plaintiffs herein were in possession and actual occupation of the above described lode mining claim and each and every part thereof, and has been in poseession and in actual occupation by themselves and their grantors from the 30th day of May, A. D. 1893, and were then and are now entitled to the possession of the said lode mining claim and each and every part thereof, and that while so possessed as aforesaid, the defendant afterwards, to-wit: on or about the 23rd day of August, A. D. 1897, wrongfully entered upon a portion of said premises and ousted these plaintiffs therefrom, to-wit: all that portion of said Eulalia Lode mining claim, U. S. survey lot No. 9234 that is included within the exterior boundary lines of U. S. survey lot No. 9441, known as the "Golden Rod" Lode mining claim, as shown by the plat filed October 21st, 1897, in the Land Office of the United States at Leadville, Colorado, with the adverse claim of these plaintiffs against the entry of said survey lot No. 9441, for patent, the said portions of the Eulalia Lode mining claim so wrongfully withheld from these plaintiffs by defendant are described by metes and bounds, as follows:

Tract A. Beginning at cor. No. 4, sur. No. 9234 Eulalia lode course N. 1, 12° 15′ E. 150.25 ft. to intersection line 3–4 sur. No. 9234, and line 4–1 sur. 471. Course 2, S. 44° 45′ W. 177.59 ft. to intersection line 4–1 sur. No. 9234 and line 4–1 sur. No. 471, course 3, S. 77° 45′ E. 95.42 ft. to cor. No. 4, sur. No. 9234, the place of beginning. Said tract A, containing 0.165 acres of ground.

Tract B. Beginning at cor. No. 3, sur. No. 9234, non-assessable lode, course 1, S. 12° 18′ E. 60.69 ft. to intersection line 2–3 sur. No. 471, and line 3–4 sur. No. 9234, course 2, N. 44° 49′ E. 262.36
13 ft. to intersection line 2–3 sur. No. 471 and line 2–3 sur. No. 9234, course 3, N. 77° 45′ W. 449.14 ft. to intersection line 2–3 sur. No. 9234 and line 2–3 sur. No. 9234, course 4, S. 47° 21′ E.

326.13 ft. to cor. No. 3, sur. No. 9234, the place of beginning. Said tract B containing 1.074 acres of ground.

Tract C. Beginning at cor. No. 2, sur. No. 9234, Eulalia Lode mining claim, course 1, S. 71° 11′ E. 186.81 ft. to intersection line 4–1 sur. No. 9234, and line 6–7 sur. No. 9441, course 2, S. 47° 21′ E. 555 ft. to intersection line 4–1 sur. No. 9234 and line 4–1 sur. No. 9234, course 3, N. 77° 45′ W. 137.68 ft. to intersoction line 1–2 sur. No. 716 Am. and line 4–1 sur. No. 9234, course 4. N. 53° W. 283.60 ft. to cor. No. 1, sur. No. 716 Am. course 5, S. 37° W. 130.56 ft. to intersection line 4–1 sur. No. 716 Am. and 4–1, sur. No. 9234, conrse 6, N. 77° 45′ W. 54.60 ft. to intersection line 3–4 sur. No. 3007 Am. and 4–1 sur. No. 9234, course 7, N. 7° E. 88.59 ft. to cor. No. 4 sur. No. 3007, course 8, N. 83° W. 151.28 ft. to intersection line 4–1 sur. No. 3007 and line 1–2 sur. No. 9234, course 9, N. 12° 15′ E. 225.42 ft. to cor. No. 2 sur. No. 9234 the place of beginning. Said tract C. containing 2.001 acres of ground.

That defendant wrongfully withholds from plaintiffs a total area of 3.240 acres, consisting of tracts A, B, and C, so described and defined as above recited;

That the defendant has ever since wrongfully withheld the possession of said parts and portions of said Eulalia Lode mining claim from these plaintiffs to their damage in the sum of five hundred dollars.

Plaintiffs further allege that this suit is brought in support of said adverse claim as filed by them October 21st, 1897, in the United States land office at Leadville, Colorado, against the
14 application for patent by the said defendant to the premises called by said defendant the "Golden Rod" Lode mining claim, and that these plaintiffs have necessarily expended for plats and abstracts for the aforesaid adverse claim and for counsel fees in its preparation the sum of two hundred dollars.

Wherefore, plaintiffs pray judgment against defendant:

1. For the restitution and recovery of possession of said parts and portions of said Eulalia Lode mining claim as fully described and set forth in this amended complaint;

2. For the sum of five hundred dollars damages;

3. For the sum of two hundred dollars so expended in support of their adverse claim;

4. For costs of suit.

GEORGE R. ELDER,
Attorney for Plaintiffs.

15 STATE OF COLORADO, } ss:
County of Lake, }

Samuel McMillen, being first duly sworn deposes and says: that he is one of the plaintiffs in the above entitled action, that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except such

matters and things as are therein stated on information and belief and as to them affiant believes it to be true.

SAM'L McMILLEN.

Subscribed and sworn to before me this 1st day of November, A. D. 1899.

My commission expires Feb. 28th, 1903.

[NOTARIAL SEAL.] ROBERT D. McLEOD,
Notary Public.

(Endorsed:) No. 5031. District court Lake county. Samuel McMillen *et al. vs.* The Ferrum Mining Co. Amended complaint. Original District court Lake county. Filed Nov. 1 1899 Jno. H. Dunn clerk, per —— —— deputy. George R. Elder att'y for pl't'ffs.

16 STATE OF COLORADO, *County of Lake,* } ss:

In the District Court within and for said County and State.

SAMUEL McMILLEN, RONALD MORRISON, and Eben Smith, Plaintiffs,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Defendant.
} Answer to Amended Complaint.

Comes now the defendant, and, answering the amended complaint of the plaintiffs herein, says:

1st. Admits that the defendant is a corporation organized and doing business under and by virtue of the laws of the State of Colorado.

2nd. Answering the second paragraph of said amended complaint, this defendant denies each and every allegation therein contained.

3rd. Answering the third paragraph of said amended complaint this defendant denies each and every allegation therein contained.

4th. Answering the fourth and fifth paragraphs of said amended complaint this defendant denies each and every allegation therein contained.

5th. Answering the sixth paragraph of said amended complaint this defendant says that as to whether or not the plaintiff Eben Smith acquired an undivided $\frac{1}{12}$ interest in and to the said
17 pretended Eulalia Lode mining claim by a good and sufficient deed of conveyance or otherwise, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

6th. Answering the seventh paragraph of said amended complaint this defendant says: That as to whether or not Ronald Morrison, by a good and sufficient deed of conveyance, or otherwise, acquired an

undivided one-sixth ($\frac{1}{6}$) interest or any interest in and to the said pretended Eulalia Lode mining claim, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

7th. Answering the eighth paragraph of said amended complaint, this defendant denies each and every allegation therein contained.

8th. Answering the ninth paragraph of said amended complaint, this defendant denies each and every allegation therein contained.

9th. Answering the tenth paragraph of said amended complaint, this defendant says: That as to whether or not the said pretended Eulalia Lode mining claim is described in the certificate of location thereof by metes and bounds, as set forth in said amended complaint, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

10th. Answering the twelfth paragraph of said amended complaint; this defendant says: That as to whether the surveyed and located lines of said pretended Eulalia Lode mining claim were or are identical with the surveyed and located lines of the Winter lode, United States survey No. 427, this defendant has not
18 and cannot obtain sufficient knowledge or information upon which to base a belief, and alleges if such is the fact that it does not state or tend to state any cause of action against this defendant.

11th. Answering the thirteenth paragraph of said amended complaint, this defendant, upon information and belief denies each and every allegation therein contained; but alleges that if the facts therein set forth were true, the same does not tend to establish any right whatsoever in the plaintiffs herein to the ground sued for in this action.

12th. Answering the fourteenth paragraph of said amended complaint, this defendant, upon information and belief, denies each and every allegation therein contained; but alleges that if the facts therein contained were true, it would not tend to establish any right whatsoever in the plaintiffs herein, or either of them or their grantors.

13th. Answering the fifteenth paragraph of said amended complaint, this defendant, upon information and belief, denies each and every allegation therein contained; but alleges that if the facts therein stated were true it would not establish any right to the ground sued for in the complainants herein, or either or any of them.

14th. Answering the sixteenth paragraph of said amended complaint, this defendant, upon information and belief, denies each and every allegation therein contained.

15th. Answering the seventeenth paragraph of said amended complaint, this defendant denies each and every allegation therein contained.

19 16th. Answering the eighteenth paragraph of said amended complaint, this defendant says that as to whether or not the

plaintiffs, or each or either of them, are citizens of the United States over the age of twenty-one (21) years, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

17th. Answering the nineteenth paragraph of said amended complaint, this defendant, on information and belief, denies each and every allegation therein contained.

18th. Answering the twentieth paragraph of said amended complaint, this defendant denies each and every allegation therein contained.

19th Answering the twenty-first paragraph of said amended complaint, this defendant denies each and every allegation therein contained; that as to whether or not the ground described in the twenty-second, twenty-third and twenty-fourth paragraphs of said amended complaint, as being in conflict is a correct description thereof, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

20th. Answering the twenty-fifth and twenty-sixth paragraphs of said amended complaint, this defendant denies each and every allegation therein contained.

21st. Answering the twenty-seventh paragraph of said amended complaint, this defendant denies that the plaintiffs or either or any of them have necessarily or otherwise expended for plats and abstracts and for counsel fees in the preparation of the said adverse — the sum of two hundred dollars ($200.00) or any other sum whatsoever.

For a further answer and by way of cross-complaint this defendant alleges:

That on or about the first day of January A. D. 1894, Charles T. Limberg and Robert B. Estey, each of them being citizens of the United States and over the age of twenty-one (21) years, entered upon the premises hereinafter described and known as the "Golden Rod" Lode mining claim, while the same were a part of the public mineral lands of the United States and vacant and unclaimed, and began to prospect, sink and explore for mineral bearing veins and lodes;

That afterwards and prior to the twenty-fifth day of January, A. D. 1894, they sank a discovery shaft on said premises to a depth of more than ten (10) feet from the lowest part of the rim of said shaft at the surface, and discovered therein a vein, lode, ledge or deposit of mineral in rock in place, bearing silver and other metals, and thereupon marked and defined the surface boundaries of said lode and premises by erecting at each corner and at the center of each side line thereof a suitable post marked on the side next the claim, and placed at said point of discovery a plain sign or notice containing the name of said lode, the names of said locators as above given, and the date of the discovery.

That thereafter and on the twenty-fifth day of January, A. D. 1894, said locators executed and caused to be recorded in the re-

corder's office of Lake county, Colorado, their location certificates of said lode and claim as provided by law.

Defendant further alleges that after the discovery, location and record of said Golden Rod lode as aforesaid, the said locators, Charles T. Limberg and Robert B. Estey, by certain deeds of
21 conveyance, sold and conveyed all their right, title interest and claim in and to said Golden Rod lode to the defendant The Ferrum Mining Company; and that the said defendant afterwards and on, to wit, the sixth day of March, A. D. 1895, for the purpose of correcting any errors in the original location, description of record, and of taking in and acquiring all forfeited or abandoned over-lapping ground, and of taking in any part of any overlapping claim which had been abandoned or cancelled; and of securing all the benefits of section 2409 of the General Statutes of Colorado; and without waiving any rights acquired by the original location and record of its grantors, caused a relocation or amended location certificate thereof to be filed in the office of the clerk and recorder of Lake County, Colorado, which said certificate contains the name of the lode, the name of the locator, the date of discovery, and the description of said claim as amended by metes and bounds as required by law; that said lode and premises are situate in the California mining district, county of Lake, State of Colorado, and described as follows, as amended, to wit:

Beginning at corner No. 1, whence corner No. 1, survey No. 427, Winter lode, bears N. 12° 15′ E., 50.11 feet, Goats' peak bears S. 82° 14′ E.; thence N. 66° 25′ W. 254.97 feet to corner No. 2; thence N. 77° 45′ W., 450 feet to corner No. 3; thence N. 83° 51′ W., 391.15 feet to corner No. 4; thence N. 71° 11′ W., 363.45 feet to corner No. 5, identical with corner No. 4, survey No. 427, whence Homestake peak bears N. 48° 04′ W., Mt. Elbert bears S. 51° 13′ W.; thence N. 12° 15′ E., 300 feet to corner No. 6; thence S. 71° 11′ E., 363.45 feet to corner No. 7; thence S. 83° 51′ E., 391.15
22 feet to corner No. 8; thence S. 77° 45′ E., 450 feet to corner No. 9; thence S. 66° 25′ E., 254.97 feet to corner No. 10; thence S. 12° 15′ W., 300 feet to corner No. 1, the place of beginning. Magnetic variation 14° E.

This defendant further shows that it claims the legal right to occupy and possess the said Golden Rod Lode mining claim and premises above described under and by virtue of the laws of the United States and of the State of Colorado, by discovery and location and pre-emption on the public mineral domain of the United States as above set forth.

That by reasons of the facts aforesaid the defendant was and now is entitled to the possession of the above described premises, and each and every part thereof.

Wherefore, the defendant prays judgment for the recovery of the possession of said premises, and for its costs in this behalf expended.

JOHN A. EWING,
F. E. BOUCK,
Attorneys for Defendant.

23 STATE OF COLORADO, } ss:
County of Lake, }

Charles T. Limberg, being first duly sworn, on oath deposes and says that he is the secretary of the defendant The Ferrum Mining Company; that he has read the above and foregoing answer and cross complaint, and knows the contents thereof; and that the facts therein stated are true to the best knowledge and belief of affiant.

CHARLES T. LIMBERG.

Subscribed and sworn to before me this 15th day of November, A. D. 1899.

[NOTARIAL SEAL.] ARTHUR E. RUNDEL,
Notary Public.

My commission expires July 24, 1903.

Endorsed: 5031 In the district court. Samuel McMillen, Ronald Morrison and Eben Smith, *vs.* The Ferrum Mining Company, a corporation, etc., Answer to amended complaint. District court Lake county. Filed Nov. 15, 1899. Jno. H. Dunn clerk By James J. Connell deputy.

24 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court within and for said County and State.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Plaintiffs,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Defendant. } No. 5031.

Replication to the Answer to Amended Complaint and Cross-complaint of Defendant.

The plaintiffs, by their counsel, George R. Elder, reply to the answer and cross-complaint of defendant herein and allege:

1. That they deny each and every allegation contained in the answer of defendant.

2. That they deny each and every allegation contained in the cross-complaint of defendant.

3. And further answering to the cross-complaint of defendant and as special matter of defense thereto, plaintiffs allege that for and during the year 1896, the defendant failed and neglected to do and perform the annual labor and assessment upon their alleged Golden Rod claim, in this, that one John McCombe, on or about November 30th, 1896, while a record co-owner, co-tenant and

tenant in common with these plaintiffs in the Eulalia Lode mining claim, entered upon the said premises known as the Eulalia Lode mining claim and as agent of the said The Ferrum Mining Company, defendant herein, employed other
25 persons to work with him and did personally work in the attempted performance of the annual labor and assessment work upon the so-called Golden Rod mining claim; that said acts of John McCombe were well known to and authorized by Robert B. Estey and Charles T. Limberg, the president and secretary, respectively, of defendant company, The Ferrum Mining Company, and plaintiffs allege that the said Robert B. Estey and Charles T. Limberg well knew at the time of such employment and agency that the said John McCombe was a co-owner, co-tenant and tenant in common with plaintiffs in the possession and ownership of the Eulalia Lode mining claim, and that the said defendant, The Ferrum Mining Company, whose executive officers the said Robert B. Estey and Charles T. Limberg were at that time, stands charged with the knowledge of such facts thereof which they possessed; that the attempt of said McCombe to do the annual labor for the Golden Rod claim while a co-owner, co-tenant and tenant in common with plaintiffs in the Eulalia Lode mining claim, was absolutely void and of no force and effect and such acts cannot avail defendant company in support of their title, in this, that such attempt is hostile to and in prejudice of the rights and title of his, McCombe's co-owners, co-tenants and tenants in common in the Eulalia Lode mining claim, the plaintiffs herein, and in violation of the relation of trust and confidence between them as co-owners, co-tenants and tenants in common, created and existing by operation of law;

And plaintiffs further allege that the said John McCombe, while doing and acting as the agent of the said The Ferrum Mining Company in the attempted performance of the annual assessment
26 work of the Golden Rod mining claim, falsely and fraudulently represented to these plaintiffs that he was so doing and acting for the purpose of performing the annual labor and assessment work for the year 1896 upon the Eulalia Lode mining claim, the property of these plaintiffs and the said John McCombe as his co-tenants, co-owners and tenants in common.

Wherefore plaintiffs demand judgment as prayed for in their complaint.

GEORGE R. ELDER,
Attorney for Plaintiffs.

27 STATE OF COLORADO, } ss.:
County of Lake, }

Samuel McMillen, being first duly sworn, says that he is one of the plaintiffs in the above entitled action, that he has read the foregoing replication and knows the contents thereof and that the facts alleged therein are true of his own knowledge.

SAM'L McMILLEN.

Subscribed and sworn to before me this 25th day of November, A. D. 1899.

[OFFICIAL SEAL.] JOHN H. DUNN,
Clerk Dist. Court,
By JAMES J. CONNELL.

(Endorsed:) No. 5031 District court Lake Co. Samuel McMillen *et al. vs.* The Ferrum Mining Co. Replication and answer to cross complaint. District court Lake Co. Filed Nov. 25th 1899 Jno. H. Dunn clerk By James J. Connell deputy Geo. R. Elder att'y for pl't'ff-.

28 STATE OF COLORADO, } *ss:*
County of Lake, }

In the District Court within and for the Fifth Judicial District in and for said County and State.

SAMUEL MCMILLEN ET AL., Plaintiffs,
v.
THE FERRUM MINING COMPANY, a Corporation, Defendant.
} Instructions Asked by the Defendants.

Given Frank W. Owers, judge.

This is an action in support of an adverse claim to determine the right of possession of certain mining lands claimed by the plaintiffs as the Eulalia Lode mining claim and claimed by the defendant as the Golden Rod Lode mining claim.

The burden of proof is upon the plaintiffs to show a valid location of the premises as the Eulalia Lode mining claim and upon the defendants to show a valid location of the Golden Rod Lode mining claim, and the party, who from the evidence, is shown to have made and maintained the first valid location of the ground in controversy by a performance of the acts hereinafter specified, *are* entitled to a recovery in this action.

——— ———,
Attorneys for Defendant.

Given Frank W. Owers judge.

29 Instruction No. —.

To make a valid location of a mining claim, a citizen of the United States, or one who has declared his intention to become such, must enter upon the unoccupied, unappropriated and unclaimed mineral domain of the United States, and discover within the limits of the claim located, a vein, lode, lead, ledge or deposit of mineral bearing rock in place and substantially comply with the following requirements.

1st. Sink a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show a well defined crevice.

2nd. Post at the point of discovery on the surface, a plain sign or notice, containing the name of the lode, the name of the locator and the date of discovery.

3rd. Mark the surface boundaries of the claim by six substantial posts hewed or marked on the side or sides which are in toward the claim and sunk in the ground, to-wit, one at each corner and one at the center of each side line.

4th. Within three months of the date of discovery, record the claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain, first: The name of the lode; second, the name of the locator; third, the date of location; fourth, the number of feet claimed on each side of the center of the discovery shaft; fifth, the general course of the lode as near as may be, and such a description of the lode as shall serve to identify the claim with reasonable certainty; or if a discovery shall be made within the boundaries of the claim at any time after the staking and recording, by the locators or their grantees, such discovery will relate back to the original location, provided there are no intervening rights acquired by others.

Given Frank W. Owers, judge

Given Frank W. Owers judge.

Instruction No. —.

The court instructs the jury that a vein, lode or deposit of mineral in rock in place is any deposit or fissure in the earth's crust filled with mineral matter clearly distinguishable from the neighboring rock. It may be very thin or very thick, or it may be very valuable or of slight value, but if it be continuous and carry any appreciable quantity of precious metal and in place it is sufficient; and any such vein of fissure which a miner would follow with the reasonable expectation of finding pay ore, will be sufficient.

Given Frank W. Owers, judge

Given Frank W. Owers judge.

CHAS. CAVENDER,
JOHN A. EWING,
Attorneys for Defendant.

Instruction No. —.

Given Frank W. Owers, judge

You are further instructed that if you find that, on or about the 10th day of March, A. D. 1894, or prior thereto, the defendant or its grantors, or the lessees of its grantors, did discover a vein or lode of mineral in rock in place, within the boundaries of the Golden Rod Lode mining claim, and that the defendant or its grantors complied with the requirements of the laws as to staking said Golden Rod Lode claim and recorded a location certificate within the time re-
31 quired by law, then you will find for the defendant.
Given Frank W. Owers judge.

CHAS. CAVENDER,
JOHN A. EWING,
Attorneys for Defendant.

Excepted to.

GEORGE R. ELDER,
Att'y for Pl'ffs.

Instruction No. —.

Given Frank W. Owers, judge

The court instructs the jury that any acts done by the lessees, in the way of opening or disclosing a vein or lode, enures to the benefit of the lessors, and in this case, if the jury find that the lessees of the defendant, during the year 1894, discovered a vein of mineral, in rock in place, such a discovery enures to the benefit of the defendants, and validates their location.
Given Frank W. Owers judge.

CHAS. CAVENDER,
JOHN A. EWING,
Attorneys for Defendant.

Excepted to

GEORGE R. ELDER,
Att'y for Pl'ffs.

Given Frank W. Owers, judge.

The court further instructs the jury that under the pleadings, and evidence introduced in this cause, the plaintiff cannot recover, and the sole issue presented to the jury, is as to whether the defendant or its grantors have made a valid discovery and location upon the Golden Rod claim and performed the necessary work thereon.

32 If the jury believe from the evidence that a valid discovery and location of a mining claim was made by the owners of the Golden Rod claim, and that one hundred dollars worth of work was done thereon, during the year 1899, then you will find for the defendant.

Given Frank W. Owers, judge.

CHAS. CAVENDER,
JOHN A. EWING,
Att'ys for Defendants.

Excepted to.

GEORGE R. ELDER,
Att'y for Pl'ffs.

Instruction No. —.

Given Frank W. Owers, judge.

The court further instructs the jury that you are the sole judges of the testimony and the credibility of the witnesses, and if you believe, from the evidence, that any witness has wilfully testified falsely as to any material fact in the case, you are at liberty to entirely disregard the testimony of such witness.

Given Frank W. Owers, judge.

——— ———,
Attorneys for Defendant.

Given Frank W. Owers, judge.

The jury are instructed that in all adverse suits there are in reality three parties to the action, to-wit, the plaintiff, the defendant and the United States. If you believe from the evidence that neither the plaintiff nor the defendant has proved a valid discovery with a valid location thereon, it becomes your duty to return a verdict in favor of the United States and against both the plaintiffs and the defendant.

Given Frank W. Owers, judge.

33 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

SAMUEL MCMILLEN, EBEN SMITH, and RONALD MORRISON, Plaintiffs,
vs.
THE FERRUM MINING CO., Defendants.

If you find that neither the plaintiffs nor the defendant is entitled to the property in dispute in this action, the form of your verdict will be:

"We the jury find that neither the plaintiffs nor the defendant has made a valid discovery or location of a mining claim upon the premises in dispute, and that the title to the property is still at this time in the United States."

February —, A. D. 1900.

—— ——, *Foreman.*

Given Frank W. Owers, judge.

Given Frank W. Owers, judge

STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

SAMUEL MCMILLEN, EBEN SMITH, and RONALD MORRISON, Plaintiffs,
vs.
THE FERRUM MINING CO., Defendant.

If you find for the defendant the form of your verdict will be:

"We the jury find the issues herein joined for the defendant and that it is the owner of and entitled to the possession of the premises as set forth and described in its answer herein as the Golden Rod Lode mining claim.

February —, A. D., 1900."

—— ——, *Foreman.*

Given Frank W. Owers, judge.

Given Frank W. Owers, judge.

Refused Frank W. Owers judge Excepted to George R. Elder att'y for pl'ffs.

34 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court within and for said County and State.

SAMUEL MCMILLEN ET AL., Plaintiffs,
vs.
THE FERRUM MINING COMPANY, Defendant. } Number 5031.

Instruction No. one.

First. This is an action in support of an adverse claim to determine the right of possession to certain mining land claimed by the plaintiffs as the "Eulalia" Lode mining claim, and claimed by the defendant as the "Golden Rod Lode mining claim."

The burden of proof is upon the plaintiffs to show a valid and subsisting location of the premises in controversy as the "Eulalia" Lode mining claim.

And upon the defendant to show a valid and subsisting location of the premises in controversy as the "Golden Rod" Lode mining claim.

And the parties who, from the evidence are shown to have made and maintained the prior valid location of the ground in controversy by a fair preponderance of the testimony and by a performance of the acts hereinafter specified are entitled to recover in this action.

To make a valid location of a mining claim, a citizen of the United States or one who has declared his intention to become such must enter upon the unoccupied, unappropriated, and unclaimed mineral domain of the United States, and discover within the
35 limits of the claim located a vein, lode, ledge or deposit of mineral bearing rock in place, and substantially comply with the following requirements.

First. Sink a discovery shaft upon the lode to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show a well defined crevice.

Second. Post at the point of discovery on the surface a plain sign or notice containing the name of the lode and the name of the locator and the date of discovery.

Third. Mark the surface boundaries of the claim by six substantial posts hewed or marked on the side or sides which are in towards the claim and sunk in the ground, to-wit: one at each corner and one at the centre of each side line.

Fourth. Within three months of the date of discovery record the claim in the office of the recorder of the county in which said claim is situated by a location certificate which shall contain.

First. The name of the lode.

Second. The name of the locator.

Third. The date of the location.

Fourth. The number of feet claimed on each side of the discovery shaft.

Fifth. The general course of the lode as near as may be and such a description of the same as shall serve to identify the claim with reasonable certainty.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Refused Frank W. Owers judge.

Excepted to
GEORGE R. ELDER,
Att'y for Pl'ffs.

36 Instruction No. one

requested by plaintiffs.

Instruction No. one

Instruction No. two.

Refused Frank W. Owers, judge.

The court further instructs the jury that although a discovery of mineral in rock in place is a necessary pre-requisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. two

requested by plaintiffs.

Instruction No. two

Excepted to.
GEORGE R. ELDER,
Att'y for Pl'ffs.

37 Instruction No. three

Refused Frank W. Owers judge.

The court instructs the jury that the essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode, or ledge of mineral-bearing rock in place and if the relocator finds such vein in the discovery shaft of the abandoned claim, he may under our statute make a valid relocation thereon; though such finding is not a disclosure of something that "existed before but remained unknown," and therefore, technically, perhaps, does not constitute a discovery.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. three

requested by plaintiffs.

Instruction No. three.

Excepted to
GEORGE R. ELDER,
Att'y for Pl'ffs.

38 Instruction No. four.

Refused Frank W. Owers, judge.

The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made of the existence of mineral.

And under section 2320 Revised Statutes of the United States the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location even though the discovery was first made by some one other than the locator.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. four

requested by plaintiffs.

Instruction No. four

Excepted to.
GEORGE R. ELDER,
Att'y for Pl'ffs.

39 Instruction No. five.

Refused Frank W. Owers, judge.

The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location.

It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein, or lode within the limits of his location but it must be known to him and claimed by him, in order to give validity to the location.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. five

requested by plaintiffs.

Instruction No. five

Excepted to.

GEORGE R. ELDER,
Att'y for Plaintiffs.

40 Instruction No. six.

Refused. Frank W. Owers, judge.

The jury are instructed that the following provisions of the statutes of Colorado must be substantially complied with in the relocation either in part or in whole of abandoned lode claims:

The re-location of abandoned lode-claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property.

Laws 1874. pp. 189, 190 sec. 16.
General Laws 1877. pp. 632, 633 sec. 1825.
General Statutes 1883. p. 725 sec. 2411.
Second vol. Mills Annotated Statutes p. 1800 sec. 3162.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. six

requested by plaintiffs.

Instruction No. six

Excepted to

GEORGE R. ELDER,
Att'y for Pl'ffs.

41 Instruction No. seven.

Refused. Frank W. Owers, judge.

You are further instructed by the court that only the unoccupied and unappropriated mineral lands of the public domain are subject to exploration and location. When one has discovered a vein and has fully complied with the law in locating and recording a claim thereon, the territory included within his surface boundaries is segregated from the public domain in so far as all parties except the Government are concerned. The locator is entitled to the exclusive possession and enjoyment thereof until it is forfeited or abandoned. The prospector cannot go within such surface boundaries to prospect for mineral veins and his act if he do so is as much a trespass as though the ground were patented. To make a valid location the prospector must discover a vein or lode or deposit upon the unoccupied and unappropriated public domain. He must then perform certain acts, among which is the sinking of his discovery shaft within the limits of the territory which he has a right to appropriate. He cannot be allowed to sink such shaft upon ground embraced within a prior valid and subsisting location.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. seven

requested by plaintiffs.

Instruction No. seven

Excepted to
GEORGE R. ELDER,
Att'y for Pl'ffs.

42 Instruction No. eight.

The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January A. D. 1894 the plaintiffs or their grantors were in the quiet and undisputed possession of the premises designated in the complaint as the "Eulalia lode" claimed by the defendant as the "Golden Rod" lode that upon May 30th, 1893, long prior to said 25th day of January, A. D. 1894 plaintiffs or their grantors posted on the surface a plain sign or notice containing the name the Eulalia lode, the name John Kennedy the locator and the 30th day of May 1893, the date of location; that the plaintiffs or their grantors so marked the boundaries

Refused Frank W. Owers, judge.

of said Eulalia Lode claim by the erection of six substantial stakes hewed or marked on the sides in toward the claim and sunk in the ground; one at each corner and one at the center of each side line so as to be readily traced, and that on or about June 17th, 1893, and within ninety days of said 30th day of May A. D. 1893 the said plaintiffs duly recorded a location certificate containing the name of the lode the name of the locator, the date of location, the number of feet in length claimed on each side of the center of discovery shaft the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface; and that theretofore, there had been discovered within such boundaries a vein or lode of quartz or other rock in place bearing gold, silver or other precious metals; then this constitutes a *prima facie* case for the plaintiffs which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture and the acquisition of a better right or title by the defend-
42½ ant and its grantors.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Excepted to

GEORGE R. ELDER,
Att'y for Pl'ffs.

Instruction No. eight

requested by plaintiffs.

Instruction No. eight.

43 Instruction No. nine.

The court instructs the jury that if they believe from evidence that no lode, ledge or vein of quartz or other rock in place bearing gold, silver or other precious metals had been disclosed and discovered in the discovery shaft of the Eulalia lode or in the shaft known as the Pocket Liner shaft prior to the location of the Eulalia lode upon the 30th day of May, 1893, either by the plaintiffs herein,

Refused Frank W. Owers judge

their grantors or some of them, or by third parties with the knowledge of such discovery by plaintiffs herein their grantors or some of them, and if they believe further from the evidence that no lode, ledge or vein of quartz or other rock in place bearing gold, silver or other precious metals had been disclosed and discovered in the Golden Rod discovery shaft or in the shaft known as the Pocket Liner shaft by the defendant or its grantors and if the jury believe from the evidence that the plaintiffs herein their grantors or some of them discovered a vein lode or ledge of quartz or other rock in place bearing gold silver or other precious metals at a depth greater than ten feet below the surface of the earth in the part or portion of said premises as designated by them as the south-east Eulalia fraction prior to any other discovery by defendant or its grantors; you are instructed that such discovery by plaintiffs relates back to the time of the original survey and location of the said Eulalia lode and enables the plaintiffs and their grantors to hold the claim against all who had not acquired interests in the lode and premises at the time the acts were performed and your verdict will then be for the plaintiffs.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Excepted to,
GEORGE R. ELDER,
Attorney for Pl'ffs.

44 Instruction No. nine requested by plaintiffs.

Instruction No. nine.

Instruction No. ten.

Refused Frank W. Owers, judge.

You are further instructed that a vein, lode or deposit authorized to be located, is a seam or fissure in the earth's crust filled with quartz or with some other kind of rock in place, carrying gold, silver or lead or other valuable mineral deposits named in the statute. It may be very thin and it may be many feet thick or thin in places widening out into extensive bodies of ore. So also in places it may be quite or nearly barren and in other places immensely rich. It is only necessary to discover a genuine mineral vein, lode or deposit whether small or large, rich or poor, within the lines of the claim located to entitle the miner to make a valid location including the vein or lode.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. ten.

requested by plaintiffs.

Instruction No. ten.

Excepted to

GEORGE R. ELDER,
Att'y for Pl'ff-.

45

Instruction No. eleven.

Refused Frank W. Owers, judge.

The court instructs the jury the law does not presume a forfeiture and a forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law; and such forfeiture and abandonment no matter how clearly established cannot avail a junior locator unless he further shows a location or re-location of said ground by substantial compliance with the statutes of the United States and the State of Colorado, by posting a new discovery notice, by sinking a new discovery shaft, by placing new stakes and by filing a new location certificate or a re-location certificate covering and containing the requirements of the statutes of Colorado, all of which acts must be antecedent to and prior to the resumption of work by the owners of a prior valid and subsisting location.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. eleven

requested by plaintiffs.

Instruction No. eleven

Excepted to

GEORGE R. ELDER,
Att'y for Pl'ffs.

46

Instruction No. twelve.

Refused Frank W. Owers, judge.

The court instructs the jury that mere failure during one year to perform the annual development work required by Revised Statutes sec. 2324 does not divest title to a Colorado mining claim in favor of a junior over-lapping location, which is not thereafter relocated in the manner prescribed by the Colorado statutes, and the resumption of development work on the senior claim in the succeeding years restores to its owner all his original rights.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. twelve

requested by plaintiffs.

Instruction No. twelve

Excepted to

GEORGE R. ELDER,
Att'y for Pl'ffs.

Refused Frank W. Owers, judge.

Instruction No. thirteen.

The court instructs the jury that under Revised Statutes of the United States, sec. 2322 vesting in the locator of a mining claim the exclusive right to its possession, a location of a mining claim may be made by one person in the name of another.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. thirteen

requested by plaintiffs.

Instruction No. thirteen

Excepted to

GEORGE R. ELDER,
Att'y for Pl'ffs.

47 Instruction No. fourteen.

The court instructs the jury that the rule of law is that a tenant in common, a co-tenant and co-owner in a mining claim cannot be permitted and allowed to do or perform any act or acts in prejudice of, hostile to, or in fraud of the rights of his co-tenants, tenants in common and co-owners in a mining claim owned in common, and that this rule is based on a community of interest in a common title which created such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to the property so situated.

Refused Frank W. Owers, judge.

If, therefore, you find from the evidence that one John McCombe on or about the first day of December, A. D. 1896 was a record owner, co-tenant and tenant in common with the plaintiffs herein in the Eulalia Lode mining claim and that this fact was known to the defendant herein, The Ferrum Mining Company and its officers, and further, that said McCombe acted as the agent of, the servant of, the foreman, a stockholder of or an employee of the Ferrum Mining Company in the performance of the annual assessment upon the Golden Rod Lode claim for the year 1896 and actually contributed his work and labor in support of the title of the Golden Rod claim, you are instructed that such acts were absolutely void and no force and effect to sustain the claim of defendant company of performance of the annual labor upon said Golden Rod claim for the year 1896.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. fourteen

requested by plaintiffs.

Instruction No. fourteen

Excepted to
GEORGE R. ELDER.
Att'y for Pl'ffs.

48

Instruction No. fifteen.

Refused. Frank W. Owers, judge.

The court instructs the jury that if they find from the evidence that John McCombe was one of the original locators and owners in the Eulalia Lode mining claim through John Kennedy the locator thereof, and afterwards parted with his title to the plaintiffs herein; the jury are instructed to disregard all the declarations, admissions and evidence of the said McCombe against the validity of the location of the Eulalia Lode mining claim, and he is estopped to assert that the Eulalia Lode mining claim was not legally located and his statements are not evidence to impeach it.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. fifteen requested by plaintiffs.

Instruction No. fifteen

Excepted to
GEORGE R. ELDER,
Att'y for Pl'ffs.

Instruction No. sixteen.

Refused Frank W. Owers, judge.

The court further instructs you that you are the sole judges of the testimony and the credibility of the witnesses and if you believe from the evidence that any witness has wilfully testified falsely as to any material fact in the case you are at liberty to entirely disregard the testimony of such witness.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Instruction No. sixteen requested by plaintiffs.

Instruction No. sixteen

Excepted to

GEORGE R. ELDER,
Att'y for Pl'ffs.

49 Know all men by these presents, that we, Samuel McMillen as principal, George R. Elder and Joseph Golob as sureties of the county of Lake and State of Colorado, are held and firmly bound unto the Ferrum Mining Company in the penal sum of five hundred ($500.00) dollars, lawful money of the United States, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly, by these presents.

Sealed with our seals and dated at Leadville, Lake county, Colorado, this 3d day of March in the year of our Lord one thousand nine hundred.

The condition of the above obligation is such, that whereas the said The Ferrum Mining Company did, on the eighth day of February, one thousand nine hundred at a term of the district court then being holden within and for the fifth judicial district in the county of Lake and State of Colorado, obtain a judgment against the above bounden Samuel McMillen, Ronald Morrison and Eben Smith for the sum of no dollars and no cents, and costs of suit to be taxed and for recovery of possession of the ground in controversy as described in the answer and cross-complaint of the said The Ferrum Mining Company from which judgment the said Samuel McMillen, Ronald Morrison and Eben Smith have prayed for and obtained an appeal to the supreme court of said State of Colorado.

Now if the said Samuel McMillen, Ronald Morrison and Eben Smith shall duly prosecute said appeal, and shall moreover pay the amount of the said judgment, costs, interest and damages, rendered and to be rendered against them, the said appellants, in case the said judgment shall be affirmed in the said supreme court, or said

appeal be dismissed for any reason, then the above obligation to be null and void, otherwise to remain in full force and virtue.

SAMUEL McMILLEN. [SEAL.]
GEORGE R. ELDER. [SEAL.]
JOSEPH GOLOB. [SEAL.]

(Endorsed.)

STATE OF COLORADO, }
Lake County. }

Personally appeared this day before me John H. Dunn clerk district court of Lake county, Joseph Golob of the county and State aforesaid, one of the securities on the bond of Samuel McMillen, Ronald Morrison and Eben Smith, who, being duly sworn, deposes and says that he is seized and possessed in his own right, over and above all his just debts and liabilities in property not exempt by law from levy and sale under execution, of a clear, unincumbered estate of the value of five hundred dollars within the jurisdiction of this State.

JOSEPH GOLOB.

Subscribed and sworn to before me, this 3d day of March, A. D. 1900.

[OFFICIAL SEAL.] JOHN H. DUNN,
Clerk Dist. Court,
By JAMES J. CONNELL, *Deputy.*

STATE OF COLORADO, }
Lake County. }

Personally appeared this day before me, John H. Dunn, clerk district court of Lake county, George R. Elder of the county and State aforesaid, one of the securities on the bond of Samuel McMillen, Ronald Morrison and Eben Smith, who, being duly sworn, deposes and says that he is seized and possessed in his own right, over and above all his just debts and liabilities, in property not exempt by law from levy and sale under execution, of a clear, unincum-
51 bered estate of the value of five hundred ($500.00) dollars, within the jurisdiction of this State.

GEORGE R. ELDER.

Subscribed and sworn to before me this 3d day of March, A. D. 1900.

[OFFICIAL SEAL.] JOHN H. DUNN,
Clerk Dist. Court,
By JAMES J. CONNELL, *Deputy.*

(Further endorsed:) Appeal bond. District court Lake county to supreme court. Samuel McMillen, Ronald Morrison and Eben Smith *vs.* The Ferrum Mining Company. Approved and filed this 5th day of March A. D. 1900. Jno. H. Dunn, clerk By —— —— deputy.

52 Be it remembered that on, to-wit, the 19th day of January, A. D. 1895, it being one of the regular juridical days of the adjourned December term, 1894, of the district court of the fifth judicial district, sitting within and for the county of Lake, State of Colorado, the following proceedings, *inter alia*, were had and entered of record in said court, to-wit:

THE FERRUM MINING COMPANY
vs.
JOHN MCCOMBE ET AL. } 4688.

Now on this day comes the plaintiff herein by John A. Ewing Esq., its attorney and come the defendants by J. M. Maxwell Esq., their attorney.

Thereupon arguments of counsel for defendants and plaintiffs were heard by their respective attorneys, and being duly considered and the court being now well advised in the premises, doth find;

And now, to-wit: on this 19th day of January, A. D. 1895, being one of the juridical days of the December term of said court, this cause coming on for hearing and trial upon the complaint of the plaintiff, the answer of the defendants and the replication of the plaintiff, the plaintiff appearing by John A. Ewing, its attorney, and the defendants appearing by John M. Maxwell, their attorney, and the court, having heard all of the evidence adduced and the arguments of counsel and being fully advised in the premises, doth find:

The issues herein joined in favor of the plaintiff, and that the plaintiff was, on the 3d day of January, A. D. 1895, in the quiet and peaceable possession of that certain portion of the premises
53 described in the complaint in this action as the Golden Rod lode or mining claim, which is adjacent to and around the shaft and workings on the said premises so described as the Golden Rod Lode mining claim and the engine house, shaft and workings in the shaft thereon which had theretofore been worked and operated by Walsh and Slavin as lessees of the plaintiff and its grantors, and the gallows frame and other improvements adjacent to and around the same, to such an extent as was necessary to be used in the working and operating of said shaft and the use of said engine house in the mining upon said premises through said shaft; and

That on the said 3d day of January, A. D. 1895, the defendants herein, together with their agents, servants and employees, did with force and arms forcibly and violently oust the plaintiff and its employees from the said shaft, engine house, gallows frame and the

ground adjoining said shaft and engine house on the said Golden Rod Lode mining claim, and by words and actions which have a natural tendency to excite fear and apprehension of danger and by threats, caused the employees of the plaintiff herein to leave said premises, shaft and workings thereon; and

That ever since said day the defendants have kept in their possession said workings, shaft and property and surface thereof which is adjacent to and around said shaft which leads to the underground workings on said premises, and of the engine house and the appliances therein and thereat, and have kept the possession thereof from the plaintiff.

It is, therefore, ordered, adjudged and decreed by the court that a writ of injunction issue out of this court under the seal
54 thereof, having the force and effect of a writ of restitution directing and commanding the said defendants and each of them, their agents, servants and employees, to surrender and restore possession of said shaft and workings therein, the gallows frame thereon and the engine house and ground adjacent to said shaft and engine house on said Golden Rod Lode mining claim to the plaintiff, its agents, servants and employees. And enjoining and restraining the defendants, their agents, servants and employees, from interfering with the workings connected with said shaft or with the gallows frame, engine house and ground immediately adjacent thereto and surrounding said shaft, or with the possession of the plaintiff, its agents, servants and employees, or from interfering *with* in any way with the plaintiff, its agents, servants and employees in gaining access to or egress from said shaft, engine house and premises adjacent to or immediately surrounding the same;

And that the said injunction be in full force and effect until the legal title to said ground is determined by such legal proceedings as either of the parties hereto may hereafter institute for the purpose of trying the title thereto, and until further order of this court;

And that plaintiff do have and recover its costs in this action, and let execution issue therefor.

And thereupon counsel for defendants excepted to the findings of the decree and every clause therein contained.

Thereupon the defendants by their attorney pray an appeal to the supreme court of the State of Colorado, which is allowed upon condition that he file herein, within — days from this day, his
55 appeal bond in the sum of — dollars, with sureties to be approved by the clerk of this court.

And time and until — days from this day is allowed said defendant in which to prepare and tender to the judge of this court his bill of the exceptions by him reserved, herein, which when signed and sealed by the said judge shall be filed herein as of this day.

56 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE FERRUM MINING COMPANY, a Corporation, Plaintiff,
vs.
JOHN MCCOMBE, RONALD MORRISON, SAMUEL MCMILLEN, and Peter W. Breene, Defendants. } Complaint.

The plaintiff complains of the above named defendants and alleges:

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado;

That on the 3rd day of January, A. D. 1895, the said plaintiff was in the quiet and peaceable possession of that certain tract, piece or parcel of ground and lode mining claim and premises known as the Golden Rod lode, ledge or deposit mining claim, lying, being and situate on Breece hill in the California mining district in Lake county, Colorado and described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, identical with corner No. 1 of U. S. survey No. 427, Winter lode, thence north 12° 30′ E. 300 feet to corner No. 2; thence north 77° 30′ W. 750 feet to side center post and same course fifteen hundred feet to corner No. 3; thence south 12° 30′ W. 300 feet to corner No. 4; thence south 77° 30′ E. 750 feet to side center post and same course 1500 feet to corner No. 1, the place of beginning. Said lode mining claim being 1500 feet in length and 300 feet in width.

57 That about — o'clock in the forenoon on the said 3rd day of January, A. D. 1895, while this plaintiff was in the possession of the aforesaid Golden Rod Lode mining claim by its agents, servants and employees, working thereon, the said defendants, with a large force of men, to-wit: sixteen men, including the defendants, McCombe, McMillan and Morrison, with force and arms forcibly and violently and by threats, ousted this plaintiff and its employees from said Golden Rod Lode mining claim and the shaft and workings thereon, and the said defendants by themselves and their said employees with force and violence, each and all of said last above named defendants and their said agents, servants and employees, holding rifles and guns in their hands pointed and leveled at the employees of this plaintiff, coupled with the statements of the said defendants, McCombe, McMillan and Morrison, that they, the said McCombe, McMillan and Morrison, and their thirteen associates would shoot and kill the said employees of this plaintiff, unless they, the employees of this plaintiff, would leave said premises and go away from and off the said property known as the Golden Rod Lode

mining claim and the shaft and workings thereon, and by said words and actions, which have a natural tendency to excite fear and apprehension of danger, and by reason of said threats the said employees of this plaintiff, believing, by the words and actions of the said defendants and their associates and employees, that they would shoot and kill the said employees of this plaintiff unless the said employees would leave and abandon the said premises and the shaft and workings thereon, left said premises, and the said defend-
58 ants, with their said agents, servants and employees, have since said time kept in their possession the said workings, shaft and property of this plaintiff and the surface of said premises which is adjacent to and around the shaft which leads to the underground workings so being worked by the said plaintiff prior to said ouster by the said defendants, and ever since that time the said defendants have kept the same in their possession and have been working, as this plaintiff is informed and believes, on the surface and underground workings on said premises and still continue to exercise acts of ownership therein and, by words and actions which have a natural tendency to excite fear and apprehension of danger, said defendants have kept plaintiff out of possession and still do keep plaintiff out of possession of all that portion of the surface of said piece or parcel of ground and Golden Rod Lode mining claim which is adjacent to and around the said shaft and workings thereon and each and all and every part of said premises, and more especially that piece of ground around said shaft, consisting of one acre more or less, and by threats and statements to the effect that the agents, officers, servants and employees of this plaintiff will be shot and killed by the said defendants, their agents, servants and employees, if the officers, agents, servants or employees of this plaintiff shall go upon or attempt to go upon or near said premises, and that the said defendants are now in the possession of said premises, workings and shaft of this plaintiff, exercising acts of ownership thereon, and, as this plaintiff is informed and believes, working thereon, and this plaintiff is kept out of possession thereof by reason of the aforesaid threats made by the defendants, which have a natural tendency to excite fear and apprehension of danger;

59 That the said defendants threaten to extract, ship, sell and dispose of mineral therefrom and will do so, unless restrained by an order of this honorable court, to the great and irreparable injury and damage of the plaintiff;

That this application is too urgent to admit of the delay of giving notice.

Wherefore, plaintiff prays for a writ of injunction for an affirmative relief having the force and effect of a writ of restitution, restoring the above named plaintiff to the possession of the above piece or parcel of ground and the Golden Rod lode and every part and parcel thereof;

And during the pendency of this action for a writ of temporary injunction enjoining and restraining the said defendants and each

and all of them, their agents, servants and employees and grantees from shipping, selling or disposing of any ore from said premises or any part or portion thereof, and from in any manner or place within the said surface boundaries of said piece or parcel of ground and Golden Rod Lode mining claim, exercising any rights of ownership thereon;

And that upon a final hearing, the same be made perpetual, and the defendants and each and all of them, their agents, servants and employees be enjoined and restrained from working or mining thereon or therein;

And for a temporary injunction enjoining and restraining the said defendants, their agents, servants and employees from interfering with the workings, shaft, gallows frame or appliances thereto attached belonging thereon;

60 And for such other and further relief as the court may deem equitable and just;

And for costs of suit.

JOHN A. EWING,
Attorney for Plaintiff.

STATE OF COLORADO, } ss:
County of Lake, }

Robert B. Estey, being first duly sworn, on oath deposes and says:

That he is the president of the above named plaintiff company;

That he has read the above and foregoing complaint and knows the contents thereof; that the matters and things and allegations and averments therein contained are true of his own knowledge, except as to the matters and things therein stated on information and belief, and, as to those, he believes it to be true.

ROBERT B. ESTEY.

Subscribed and sworn to before me this 5th day of January, A. D. 1895.

[NOTARIAL SEAL.] FRANK W. McQUISTON,
Notary Public.

On filing the above and foregoing petition and complaint and executing a good and sufficient bond, as required by law, in the sum of three thousand dollars, with sufficient sureties, to be approved by the clerk of this court, that a temporary injunction issue in the above entitled action as prayed for in said complaint, enjoining and restraining the defendants, their agents, servants and employees from shipping, selling or disposing of any ore taken from the

61 said premises, or from in any manner interfering with the workings or improvements upon said Golden Rod Lode mining claim which were in the possession of plaintiff on the 3rd

day of January 1895, and from exercising any acts of ownership thereon.

T. A. DICKSON, *Judge.*

Dated Jan. 5th, 1895

(Endorsed :) Case No. 4688. In dist. court. The Ferrum Min. Co. a corporation *vs.* John McCombe, Sam. McMillan, Ronald Morrison & P. W. Breene. Complaint Filed Jan'y 5, 1895 W. H. Brisbane, clerk By W. M. Dickinson D. C. Jno. A. Ewing att'y for pl'ff.

STATE OF COLORADO, } *ss.*
Lake County, }

In the District Court of the Fifth Judicial District of Colorado in and for the County of Lake.

THE FERRUM MINING COMPANY, a Corporation, Plaintiff, }
vs. }
JOHN MCCOMBE, RONALD MORRISON, SAMUEL MCMILLAN, and Peter W. Breene, Defendants. } Summons.

The People of the State of Colorado to the defendants above named, Greeting :

You are hereby required to appear in an action brought against you by the above named plaintiff, in the district court of Lake county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county, or by publication, within thirty 62 days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint; and if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinabove specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to obtain a writ of restitution restoring the plaintiff to the possession of the Golden Rod lode, ledge or deposit mining claim situate on Breece hill, California mining district, Lake county Colorado, as set forth and described by metes and bounds in the complaint in this action, together with the shaft and workings on said premises, and the surface of said premises which is adjacent to and around the said shaft; and for relief by injunction as set forth and described in the complaint in this action; and for such other and further relief as to the court may seem meet and proper; and for costs of this action, as will more fully appear from the complaint in said action to which reference is here made; and which is now on file in this office.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will apply for judgment by default against you according to the prayer of said complaint.

Given under my hand and the seal of said court in said county, this 5th day of January, A. D. 1895.

[OFFICIAL SEAL.]

W. H. BRISBANE,
Clerk of District Court,
By W. M. DICKINSON,
Deputy Clerk.

63 (Endorsed.)

STATE OF COLORADO, } ss:
Lake County, }

I do hereby certify that I have duly served the within summons together with a copy of the complaint in the within stated action on this 5 day of January A. D. 1895 at Leadville in said county and State by personally delivering to and leaving with the within named defendants Peter W. Breene and Roland Morrison and further on this 7" day of January A. D. 1895, at Leadville in said county and State by personally delivering to and leaving with the within named defendant Samuel McMillan, the said defendants personally, in the county of Lake, a copy of said summons in the action therein mentioned, and I further certify that I further executed the within summons on this 5th day of January A. D. 1895 at Leadville Lake county Colorado and duly served the within summons in the within stated action on the within named defendant John McCombe by delivering to and leaving a copy of said summons at the usual place of abode of the said John McCombe with Alice J. McCombe wife of the said John McCombe a member of his John McCombe's family over the age of fifteen years.

GAVIN LESLIE, *Sheriff,*
By J. W. IVES,
Under Sheriff.

No. 4688. Summons. Lake county district court. The Ferrum Mining Co. plaintiff *vs.* John McCombe *et al.*, defendants.

STATE OF COLORADO, } ss:
County of Lake, }

Office of the sheriff of said county.

Received Jan. 5, 1895,

GAVIN LESLIE, *Sheriff,*
By J. W. IVES, *Deputy.*

Sheriff's Fees.

Service.....
Mileage.....
Return.....

Total .....

Filed this 7th day of Jan'y A. D. 1895.

W. H. BRISBANE, *Clerk*,
By WM. DICKINSON, *Deputy*.
J. A. EWING,
Att'y for Pl'ff.

64 STATE OF COLORADO, } ss.:
County of Lake, }

In the District Court within and for said County and State.

THE FERRUM MINING COMPANY, a Corporation, Plaintiff, }
vs. } Answer.
JOHN MCCOMBE, RONALD MORRISON, SAMUEL MCMILLAN, and Peter W. Breene, Defendants. }

Answering the complaint filed herein, the defendants deny,

That on the 3d day of January A. D. 1895, or at any other time, the said plaintiff was in the quiet or peaceable possession of that certain tract, piece or parcel of ground or lode mining claim or premises known as the Golden Rod lode, ledge or deposit mining claim, lying and being situate on Breece hill, in the California mining district in Lake county, Colorado, and that, as to whether or not said so called and pretended Golden Rod mining claim is described by metes and bounds as alleged and set forth in the complaint herein, defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore deny the same.

And these defendants deny each and every other allegation in said complaint contained.

And the defendants allege, that on, and for a long time prior to the 2nd day of January A. D. 1895, they were in the quiet and peaceable and undisturbed possession of that certain tract, piece and parcel of ground and lode mining claim known as and called the Eulalie Lode mining claim, situate on Breece hill in Cali-
65 fornia mining district, county of Lake, State of Colorado, described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, a pine post being identical with cor. No. 1 of survey No. 427, Winter lode, thence N. 12° 30′ E. 300 ft. to cor. No. 2, a pine post, thence N. 77° 30′ W. 750 ft. to side center stake, 1500 ft. to cor. No. 3, a pine post. Thence S. 12° 30′ W. 300

ft. to cor. No. 4, a pine post, thence S. 77° 30′ E. 750 ft. to side center stake, 1500 ft. to cor. No. 1 the place of beginning. Said claim being 1500 feet in length by 300 ft. in width.

That these defendants were so in the quiet, peaceable and undisturbed possession of said Eulalia Lode mining claim as above described, by their agents, servants and employees, for a long time prior to said 2nd day of January A. D. 1895, and up to and until the hour of nine o'clock of the afternoon of said day, that being the hour when the agents, servants and employees of these defendants temporarily left said premises and mining claim for the night.

That these defendants, by and through their agents, servants and employees, on said 2nd day of January A. D. 1895, and up to the hour aforesaid of said day, and for a long time prior to said date and day, were and had been actively engaged in prosecuting mining work and development on said mining claim and premises, in sinking a mining shaft on said mining claim, and premises, and otherwise developing the same.

That when and at the time these defendants, their agents, servants and employees, left said mining claim and premises, at the hour and on the said 2nd day of January A. D. 1895, these de-
66 fendants, their agents, servants and employees left upon and in said mining claim and premises, the mining machinery, engine, boiler, hoister, gallows, frame, rope, cable, buckets, mining tools and mining supplies, the property of these defendants, which had been theretofore used and were at that time, being used by these defendants, their agents, servants and employees, in the working and developing of said mining claim and premises as aforesaid.

That at the time these defendants, their agents, servants and employees, left said mining claim and premises as aforesaid, it was the intention of these defendants, their agents, servants and employees, to return to said mining claim and premises, and resume work and operations upon the same, on the following day, to wit, the 3rd day of January A. D. 1895, at the usual hour in the morning for resuming work.

That at the hour of seven o'clock of the forenoon of the 3rd day of January A. D. 1895, these defendants, their agents, servants and employees, attempted to return to said mining claim and premises, for the purpose and with the intention of resuming work thereon, and undertook so to do, when they found said mining claim and premises, and the shaft and workings thereon, in which these defendants, their agents, servants and employees had been at work on the 2nd day of January A. D. 1895, in the possession of a large force and body of men who refused to permit or allow these defendants, their agents, servants and employees, to enter into or resume possession of said mining claim and premises, or the shaft or workings thereon, and by threats and words and actions which have a natural tendency to excite fear and apprehension of danger, said large force and body of men prevented these defendants,
67 their agents, servants and employees, from entering into possession of said mining claim and premises, the workings and

shaft thereon, and that portion of the surface of said mining claim and premises adjacent and contiguous to said shaft and workings.

That said large force and body of men had entered into and taken possession of said mining claim and premises during the hours of the night, between nine o'clock p. m. of the 2nd day of January A. D. 1895 and six o'clock a. m. of the 3rd day of January A. D. 1895, while these defendants, their agents, servants and employees, were temporarily absent from said mining claim and premises.

That thereupon these defendants, by every peaceable and fair means within their power, endeavored to persuade and induce said large force and body of men to leave said mining claim and premises and to surrender and give up the quiet and peaceable possession of said mining claim and premises and the workings and shaft thereon, to these defendants, but said large force and body of men and each and all of them absolutely and positively refused so to do, and informed and told these defendants that they were in possession of and were holding said mining claim and premises and the workings and shaft thereon, for the plaintiff above named, and that they intended to hold said mining claim and premises, and the working shaft thereon for the plaintiff above named, and against these defendants, their agents, servants and employees, and all persons claiming by, through or under the defendants, and that they had been hired and employed by the above named plaintiff for that purpose, and intended to perform that service.

68 That these defendants were informed and believed, and therefore allege the fact to be, that said large force and body of men were armed and had in their possession guns, pistols, revolvers and other weapons and were prepared to hold and maintain possession of said mining claim and premises, and the workings and shaft thereon, by force and violence if necessary, and said men informed these defendants, that it was their intention so to do.

These defendants deny that at any time on the 3rd day of January A. D. 1895, or at any other time, while the plaintiff was in possession of the said pretended Golden Rod Lode mining claim by its agents, servants and employees working thereon, they did or committed any of the acts or things alleged, charged and set forth in the complaint herein, and deny that on said date or for a long time prior thereto, the plaintiff, by or through its agents, servants or employees, was in possession of said alleged or pretended mining claim, or was working the same, or was in possession thereof except as above set forth and alleged, and these defendants allege that the pretended and alleged possession of said plaintiff of said pretended and alleged mining claim and premises was taken while these defendants were temporarily absent from their said mining claim and premises, to-wit the Eulalie Lode mining claim above described, and without the knowledge or consent of these defendants, and against the rights of these defendants in the premises, and these defendants allege that the said large force and body of men, the alleged and pretended agents, servants and employees of the plaintiff herein,

were hired and employed by the plaintiff for the sole and express purpose of taking possession of said Eulalie Lode mining claim, the property of these defendants, while these defendants were temporarily absent therefrom, and for the purpose of
69 keeping these defendants, their agents, servants and employees out of the possession of said Eulalie Lode mining claim by force and violence, and by words and actions which have a natural tendency to excite fear and apprehension of danger, and that the plaintiff, on said 3rd day of January A. D. 1895, and prior thereto, well knew and had notice of the fact, that these defendants, their agents, servants and employees, were, on said 3rd day of January, A. D. 1895, and prior thereto, had been in the quiet and peaceable and undisturbed possession of said Eulalie Lode mining claim, and were on said date, and prior thereto had been working and developing the same.

Wherefore these defendants pray, that the temporary injunction, heretofore, to-wit, on the 5th day of January A. D. 1895, issued and granted herein may be dissolved, set aside and for naught held, that these defendants may be hence dismissed with their costs in this behalf expended.

JOHN M. MAXWELL,
Attorney for Defendants.

STATE OF COLORADO, } ss:
County of Lake, }

John McCombe being duly sworn upon his oath says. I am one of the above named defendants. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge, except such matters and things as are therein stated upon information and belief, and as to those, I believe them to be true.

JOHN McCOMBE.

Subscribed and sworn to before me this 10th day of January A. D. 1895.

WM. ELIOT HUGO,
Notary Public.

[NOTARIAL SEAL.]

My commission expires 24 November 1897.

70 (Endorsed:) 4688 In the district court Ferrum Mng. Co. *vs.* John McCombe *et al.* Answer. District court Lake county Filed Jan. 12 1895 J. H. Dunn clerk. By —— —— deputy. John M. Maxwell att'y for defendants.

STATE OF COLORADO, } ss:
County of Lake. }

In the District Court of the Fifth Judicial District of the State of Colorado in and for the County of Lake.

THE FERRUM MINING COMPANY, Plaintiff,
vs.
JOHN MCCOMBE, RONALD MORRISON, SAMUEL MCMILLEN, and Peter W. Breene, Defendants. } Injunction.

The People of the State of Colorado to the defendants above named send greeting:

The above named plaintiff having filed its complaint in our district court of the fifth judicial district, against the above named defendants, praying for an injunction against said defendants, requiring them to refrain from certain acts and to do certain acts in said complaint, and hereinafter more particularly mentioned: On the hearing of said cause, before said court the same having been duly set for trial and the court having heard the evidence adduced and the arguments of counsel, and it satisfactorily appearing to the judge of said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor,

71 We, therefore, in consideration thereof, and of the particular matters in the said complaint set forth and the findings and the decree in this cause do strictly command you and each and every of you, that until the further order of said court, you and each of you, your and each of your servants, agents, attorneys, employees, and all persons acting under the control, authority or direction of you or either of you, the defendants above named, do absolutely refrain and desist from interfering with the workings connected with the shaft or with the gallows frame engine house, and ground immediately surrounding said shaft or with the possession of the plaintiff its agents, servants and employees or from interfering in any way with the plaintiff, its agents servants and employees in gaining access to or egress from said shaft engine house and premises adjacent to, or immediately surrounding the same, said shaft engine house workings being upon the Golden Rod Lode mining claim, situate on Breece hill in Lake county, Colorado, and described by metes and bounds in the complaint filed in this action. And we do further strictly command you and each and every one of you, that you and each of you your and each of your servants agents attorneys employees, and all persons acting under the control, authority or direction of you or either of you the defendants above named, that you surrender and restore to the plaintiff its agents servants and employees possession of the shaft and workings thereon the gallows frame, thereon and the engine house and grounds adjacent to said shaft and engine house on the Golden Rod Lode mining

claim which last above described shaft gallows frame engine house and ground adjacent thereto is upon and a portion of the Golden Rod Lode mining claim, which Golden Rod Lode mining claim is particularly described in the complaint herein.

72 Witness, Geo. P. Brown, clerk of said court and the seal thereof, at Leadville aforesaid, this 22d day of January A. D. 1895.

JOHN H. DUNN, *Clerk*,
By JAMES J. CONNELL,
Deputy Clerk.

[OFFICIAL SEAL.]

(Endorsed.)

STATE OF COLORADO, } ss:
County of Lake, }

I do hereby certify that I have duly executed the within writ on this 24th day of January A. D. 1895 at Leadville in said county and State by personally delivering to and leaving with the within named defendants a true copy of this injunction.

GAVIN LESLIE, *Sheriff*,
By —— ——, *Deputy*.

No. 4688. District court fifth judicial district, Lake county, Colo. The Ferrum Mining Co. plaintiff *vs.* John McCombe *et al.* defendant. Injunction. Sheriff's fees: Service $4.00 Mileage .80 Return, —. Total, $4.80. Filed in the district court this 25th day of January A. D. 1895. J. H. Dunn clerk. By —— —— deputy. John A. Ewing, attorney for plaintiff.

73 STATE OF COLORADO, } ss:
County of Lake, }

I, John H. Dunn, clerk of the district court of the fifth judicial district, sitting within and for the county of Lake, do hereby certify that the above and foregoing is a true, perfect and complete copy of the order setting for trial, trial, judgment, amended complaint, summons, amended answer and cross complaint, replication, appeal bond, instructions, given and refused, in case numbered 5031 on the dockets of said court it being the suit of Samuel McMillen, Ronald Morrison and Eben Smith *vs.* The Ferrum Mining Company, as the same now remains of record in my office.

And I further certify that the complaint, answer, summons, final injunction writ and judgment numbered 4688 are true perfect and complete copies of same in case 4688 being the action of The Ferrum Mining Company *vs.* Samuel McMillan *et al.* as the same now remains of record in my office.

And I further certify that the bill of exceptions hereto attached is the original bill of exceptions filed herein.

Witness, my hand and the seal of said court this 5th day of April, A. D. 1900.

JOHN H. DUNN, *Clerk*,
[SEAL.] By JAMES J. CONNELL, *Deputy*.

(Revenue stamp.)

74 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court of the Fifth Judicial District, Sitting within and for the County of Lake.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Plaintiffs,
vs.
THE FERRUM MINING COMPANY, Defendant.

Plaintiffs' Bill of Exceptions.

Appearances.

For the plaintiffs: George R. Elder, Esq.
For the defendant: John A. Ewing, Esq., Charles Cavender, Esq.

Be it remembered that on the trial of this cause, before the Honorable Frank W. Owers, judge, at the December A. D. 1899 term of said court, to wit, on the seventh day of February, 1900, a jury having been duly selected, empaneled and sworn to try the same, the plaintiffs to maintain the issues herein in their behalf, gave in evidence as follows, that is to say:

75

COPY PL'FFS' EX. No. 1.

Ore Settlement.

No. —.

The Union Smelting Company.

Bought of Eulalia mine, R. Morrison, mgr.

LEADVILLE, COLO., *January* 2, 1895.

Lot No.		Name of ore.	Gross lbs.	Moisture per cent.	Net lbs.	Assay.				Basis of settlement.			Cost of treatment.		Net total per ton.		Am't received.
Smelter.	Mine.					Ounces gold.	Ounces silver.	Per cent. lead.	X S. Tiv².	Per oz. gold.	Per ounce silver.	Per unit lead.					
												Loss in smelting %	*Dol.*	*Cts.*	*Dol.*	*Cts.*	
509	1	.....	28050	7²	26030	1⁰	5⁰	....	66.7¾	19	59¾	5	13	50	8	56	11140

Analysis: ——.

Please call & get check.
Received payment ——, 189–.
By —— ——.

THE UNION SMELTING COMPANY,
By J. Y. OLIVER.

76 Mr. ELDER: On account of a great many matters of simple detail I would like the privilege of commencing with these detail matters to allow some of these gentlemen to escape from waiting on the court.

The COURT: In this case there will only be allowed four witnesses to a simple fact on either side; let us understand that before you begin the case, so you can conduct your examination accordingly.

JOHN M. MAXWELL being called as a witness for the plaintiff and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Maxwell, were you acquainted with John Y. Oliver in his life time?
A. I was, yes, sir.
Q. Was that acquaintance of an intimate character?
A. Somewhat.
Q. Business acquaintance?
A. To some extent.
Q. Was it sufficient for you to be able to identify his signature?
A. I think perhaps I could.

Paper produced and marked for identification Plaintiffs' Exhibit 1.

Q. Will you look at the signature on the smelter settlement and state whose it is—state if you are acquainted with the signature?

Mr. CAVENDER: Don't state that. You cannot prove that by an expert until he is cross examined.

Mr. ELDER: I will ask the proper question to get it within the rules of the court.

The COURT: If Mr. Maxwell says he knows that signature he undoubtedly knows it.

77 PLAINTIFFS' EX. #2.

LEADVILLE, COLO., *Nov.* 15, 1894. No. —.

The Leadville savings and deposit bank

Pay to the order of Jas. Welsh $15.00, fiifteen 00/100 dollars.

R. MORRISON.

Eulalia.

Leadville savings and deposit bank. Paid Nov. 27, 1894.

[Endorsed:] James Walsh Little & Dooley J. Heath T. J. Ballinger Copy

78 LEADVILLE, COLO., *Nov.* 15, 1894. No. —.

The Leadville savings and deposit bank

Pay to the order of John O'Dea $18.00, eighteen 00/100 dollars.
R. MORRISON.

Eulalia.
Leadville savings and deposit bank. Paid Nov. 21, 1894.

[Endorsed:] John O'Dea. For deposit in American national bank to the credit of Hugh O'Hara American national bank Paid Nov. 20, 1894 Receiving teller Leadville, Colo. Copy

79 LEADVILLE, COLO., *Nov.* 15, 1894. No. —.

The Leadville savings and deposit bank

Pay to the order of John Green $18.00, eighteen 00/100 dollars.
R. MORRISON.

Eulalia.
Leadville savings and deposit bank. Paid Nov. 23, 1894.

[Endorsed:] John Green Pay to order of Carbonate national bank Leadville, Colorado. For deposit to credit of Hugh Kelly Carbonate nat'l bank Paid Nov. 23, 1894 Receiving teller Leadville, Colo. Copy

80 LEADVILLE, COLO., *Nov.* 15, 1894. No. —.

The Leadville savings and deposit bank

Pay to the order of Pat Lyons $18.00, eighteen 00/100 dollars.
R. MORRISON.

Eulalia.
Leadville savings and deposit bank. Paid Nov. 22, 1894.

[Endorsed:] Patrick Lyons Carbonate nat'l bank. Paid Nov. 22 1894 Paying teller Leadville, Colo. Copy

81 LEADVILLE, COLO., *Nov.* 15, 1894. No. —.

The Leadville savings and deposit bank

Pay to the order of Gus Larsen $18.00, eighteen 00/100 dollars.
R. MORRISON.

Eulalia.
Leadville savings and deposit bank. Paid Nov. 21, 1894.

[Endorsed:] Gus Larson E. Bergerman By C. O. B. American national bank Paid Nov. 21, 1894 Paying teller Leadville Colo. Copy

82 LEADVILLE, COLO., *Nov.* 15, 1894. No. —.

The Leadville savings and deposit bank

Pay to the order of Tim Murphy $18.00, eighteen 00/100 dollars.

R. MORRISON.

Eulalia lode.
Leadville savings and deposit bank. Paid Nov. 20, 1894.

[Endorsed:] Tim Murphy T. B. Flood & Co. Carbonate nat'l bank Paid Nov. 19, 1894 Paying teller Leadville, Colo. Copy

83 COPY PL'FFS' EXHIBIT # 3.

Pay Roll.

Pay Eulalia lode month ending Oct. 31st, 1894.

Names.	No. of days.	Rate per day.	Total Amount.	Paid on account.	Deduct for —.	Balance due.	Signatures. We, the undersigned, do hereby acknowledge to have received the sums set opposite to our respective names.
Jas. Welsh	5	3 00	15 00			15 00	James Walsh.
John O'Dea	6	3 00	18 00			18 00	John O'Dea.
John Green	6	3 00	18 00			18 00	John Green.
Pat Lyons	6	3 00	18 00			18 00	Patrick Lyons.
Gus Larson	6	3 00	18 00			18 00	Gus Larson.
Tim Murphy	6	3 00	18 00			18 00	Tim Murphy.
			105 00				
Powder fuse &c. caps			10 00				

84 Mr. CAVENDER: We are saving our objection for the purpose of not encumbering the record. We don't think it is material whether this is a smelter settlement by Mr. Oliver or anybody else.

The COURT: It is not offered in evidence at this time; it is marked for identification. It is not even stated what it is, and he is asking the witness to state whether the signature is Oliver's signature or not.

(Question read.)

The COURT: Strike out the word- "smelter settlement" and put it "the paper marked Exhibit 1 for identification."

Q. Now you may answer.

A. I believe that to be Mr. J. Y. Oliver's signature.

Q. Will you state if you know, Mr. Maxwell, what was Mr. Oliver's occupation?

A. At what time?

Q. In January, 1895, December, 1894?

A. I believe he was connected with the Union smelter.

Q. Were you acquainted with Mr. Ronald Morrison?

A. Yes, sir.

Q. Was your acquaintance of a close business character; was he a client of yours?

A. Yes, sir.

Q. For the purpose of identification I hand Mr. Maxwell six checks, dated the 15th of November, 1894, and ask him if he was acquainted with Mr. Ronald Morrison's signature?

A. I was.

Said six papers are pinned together and marked as Exhibit 2.

85 *Copy Ex.* # 4.

LEADVILLE, COLO., *Nov.* 21*st*, 1894. No. —.

The Leadville savings and deposit bank

Pay to the order of Mike Boland $36.00 thirty six 00/100 dollars.

R. MORRISON.

Eulalia.

Leadville savings and deposit bank. Paid Nov. 22, 1894.

[Endorsed:] Carbonate nat'l bank Leadville, Colo. Paid Nov. 22, 1894. Receiving teller Mike Boland Sands Bros.

86 No. —. LEADVILLE, COLO., *Nov.* 20*th*, 1894.

Time check.

This is to certify that Mike Boland has worked twelve 12 days for Eu-alia as miner at $3.00 per day.. ..... $36.00
Deductions Deduct for $— ....
" " ..... $

Balance due..... $36.00

Rec'd payment,

MIKE BOLAND.

Eu-alia.
$36.00

For sale by John Nowland & Co. 400–402 Harrison avenue, Leadville, Colo.

87 Perforated. $36.

LEADVILLE, COLO., *Nov.* 22*nd*, 1894. No. —.

The Leadville savings and deposit bank

Pay to the order of Murty McCarty $36.00 thirty six 00/100 dollars.
R. MORRISON.

Eulalia.
Leadville savings and deposit bank. Paid Dec. 3, 1894.

[Endorsed:] Murty McCarty J. E. Coombs Carbonate nat'l bank Leadville Colo. Paid Dec. 1, 1894 Receiving teller Copy Ex. 4.

88 No. —. ——, COLO., —— —, 189–.

This is to certify that Murty McCarty has worked twelve 12 day- for Eu-alia as miner at $3 per day..... $36.00
Deductions—Deduct for $— ....
" " ..... $

Balance due..... $36.00

WM. CARSON.

Eu-alia.
$36.00.

For sale by John Nowlan & Co. 400–402 Harrison avenue, Leadville, Colorado.

[Endorsed:] M. M. McCarthy.

88½ LEADVILLE, COLO., *Nov. 29th*, 1894.

This is to certify that Edward Garrey has worked seven (7) days for Eu-alia

a a $— per da..... $

Deductions—Deduct for $— .....

" " ..... $

Balance due..... $

WM. CARSON.

For sale by John Nowland & Co. 400–402 Harrison avenue, Leadville, Colo.

[Endorsed :] Copy Ex. 4.

89 Perforated. $81.

LEADVILLE, COLO., *Dec. 10th*, 1894. No. 183.

The Leadville savings and deposit bank

Pay to the order of Gus Larson $81.00 eighty one 00/100 dollars.

R. MORRISON.

Eulalia.

Leadville savings and deposit bank Paid Dec. 1, 1894

[Endorsed :] Gus Larsen American national bank Leadville, Colo. Paid Dec. 11, 1894 Receiving teller For deposit in American national bank to the credit of E. Bergerman Copy Pl'ff's Ex. 4.

90 Perforated. $67.

LEADVILLE, COLO., *Dec. 10th*, 1894. No. 184.

The Leadville savings and deposit bank

Pay to the order of Tim Murphy $67.50 sixty-seven 50/100 dollars.

R. MORRISON.

Eulalia.

Leadville savings and deposit bank. Paid Dec. 13, 1894.

[Endorsed :] Tim Murphy American national bank Leadville Colo. Paid Dec. 13, 1894 Receiving teller. For deposit in American national bank to the credit of E. Bergerman. Copy Pl'ff's Ex. 4.

91 Perforated. $3.

LEADVILLE, COLO., *Dec.* 11*th*, 1894. No. 186.

The Leadville savings and deposit bank

Pay to the order of Stevens and Brooks $3.20 three 20/100 dollars.

R. MORRISON.

Leadville savings and deposit bank Paid Dec. 15, 1894

[Endorsed:] Eugene Stevens Copy Pl'ff's Ex. No. 4.

92 IBEX, COLO., *December* 10*th*, 1894.

R. Morrison to Stevens & Brooks, assayers, Dr.

Assaying Eulal*lie* M..... ..... 3.20

Paid.

STEVENS & BROOKS.

[Endorsed:] Copy Pl'ff's Ex. No. 4.

COPY PL'FFS' EX. #5.

Pay Roll.

Eulalia lode, by McCombe, Morrison & Co., month ending Nov. 30th, 1894.

Names.	No. of days.	Rate per day.	Total amount.	Paid on account.	Deduct for —.	Balance due.	Signatures. We, the undersigned, do hereby acknowledge to have received the sums set opposite to our respective names.
Mike Boland	12	3 00	36 00			36 00	Mike Boland.
Murty McCarty	12	3 00	36 00			36 00	M. McCarthy.
Edward Gancy	7	3 00	21 00			21 00	Edward Garrey.
Gus Larson	27	3 00	81 00			81 00	Gus Larsen.
Tim Murphy	22½	3 00	67 50			67 50	Tim Murphy.
Powder fuse & caps from A	7	3 00	21 00			21 00	Paid.
Tom Horrigan	6	3 50	21 00			21 00	Thos. Horrigan.
			283 50			283 50	
Stevens & Brooks assays			3 20				
			286 70				

[Endorsed:] No. 2. Pay roll. Eulalia mining claim. Month ending Nov. 30th 1894. 11-1-1-11-11-12-11-10-9-8-7-6-5-4-3-2-1-18-17-16-15-14-13-12

94 Q. Look at those six papers marked for identification Exhibit 2 and state if you know whose signature is on them?

A. I believe those signatures are Mr. Ronald Morrison's.

Q. I hand Mr. Maxwell another paper marked Plaintiffs' Exhibit 3 and ask him if any part of that paper is in the handwriting of Mr. Ronald Morrison.

A. I can't say.

Six papers pinned together and marked for identification Plaintiffs' Exhibit 4.

Q. I hand Mr. Maxwell six other papers and ask him if he recognizes the signature, and whose signature it is.

A. I believe the signatures to some of these papers is Mr. Morrison's. They are six checks.

Q. I hand you another paper, Mr. Maxwell, and ask you if you recognize the handwriting of Mr. Morrison upon that paper?

A. Well, I can't say whose writing that is.

Q. How long have you known Mr. Ronald Morrison, Mr. Maxwell?

A. Fifteen or sixteen years.

Q. What period of that time has he been a client of yours?

A. He was a client of mine four or five years previous to the time he left here.

Q. How long have you known J. Y. Oliver?

A. Known him probably ten years before his death.

No cross examination.

95 NOAH GREGG being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Gregg, are you a resident of Lake county?

A. I am.

Q. What was your occupation on or about January first, 1895?

A. Weighmaster for the Ibex Mining Company.

Q. In your capacity as scale man did you weigh ores for other parties?

A. Some, yes.

Q. Will you look at the paper marked six and state in whose handwriting it is? (Showing witness Plaintiffs' Exhibit 6.)

A. That is my handwriting.

Q. What is it?

A. It is a bill for weighing three loads of ore.

No cross examination.

EUGENE STEVENS being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Paper produced and marked for identification Plaintiffs' Exhibit 7.

Q. What is your occupation?
A. Assayer and chemist.
Q. What was your occupation in December, 1894?
A. Assayer and chemist.
Q. Do you know Ronald Morrison?
A. I do.
Q. Were you employed by him during the month of December, 1894?
A. Yes, sir.
Q. I hand you exhibit marked 7; will you state if you ever seen that before and what it is?

96 COPY PLAINTIFFS' EXHIBIT No. 6.

LEADVILLE, COLO., *Jan'y 1st*, 1895.

DR.

Eulalia lease to N. S. Gregg for weighing lot No. 1, 3 loads ..... $.30

COPY PLAINTIFF'S EXHIBIT No. 7.

Office of Eugene Stevens, assayer, 110 East Fourth St.

LEADVILLE, COLO., *Dec.* 18, 1894.

This certifies, that the sample of ore, said to be from the Eulalia lode, assayed for Mr. Morrison gave the following result per ton:

No.	No. 1. Marks.	Silver ounces.	Gold ounces.	Lead per ct.	Iron per ct.	Mang. per ct.	Silica per ct.	Copper per ct.	Zinc per ct.
1	500 Union Tin Co....	15	1.	1.	9⁴	4-10	77⁸		
2									
3									
4									
5									
6									
7									

Copy Pl'ffs' Ex. 7.

Whipple, printer.

EUGENE STEVENS, *Assayer.*

97 Mr. CAVENDER: Don't state what it is.

Q. Have you seen it before?
A. Yes, sir.
Q. What is it?

Objected to by defendant as not the best evidence.

The COURT: The objection is sustained until it is offered in evidence.

Q. Is that your signature?
A. Yes, sir.

Mr. ELDER: We will offer in evidence assay certificate dated December 18th, 1894 of ore said to come from the Eulalie lode, assayed by Mr. Stevens.

Mr. CAVENDER: We object to it, because there is no proof tending to show that it came from that lode.

The COURT: If you prove by this witness that that ore came from that property, then you can prove its contents.

Q. I will now ask the witness if upon the 18th day of December, 1894, or near there, he received a sample sack marked "Lot 1—509"

Objected to by defendant.

The COURT: You must first trace the ore to Mr. Stevens, and then when you have traced the ore to Mr. Stevens you can put Mr. Stevens on the stand to show what the assay of the ore was, unless the gentlemen will consent to your proceeding out of order.

Q. Will you state, Mr. Stevens, what that paper is?

Mr. CAVENDER: We object to his stating anything except that it is an assay certificate.

98 Mr. ELDER: Do you object to his stating that it is signed by Mr. Stevens?

Mr. EWING: He has already stated that.

No cross examination.

JAMES BURN being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. I hand you two papers, a check and one document, marked Exhibit 8 and ask you to state if any part of those contain your hand writing?

A. Yes, sir; the bill is in my hand writing, and the signature on the check, the endorsement.

Q. What was your occupation on or about the date of that bill?

A. I was looking after the sampling of ores at the smelter.

Q. Now that you have seen that bill and check do you remember anything of the transaction covered by that paper?

The COURT: Your answer to that will be either yes or no.

Q. Do you recollect anything of the transaction?

A. Yes, sir.

Q. Will you state what it was?

Mr. CAVENDER: Of your own knowledge.

Q. Of your own knowledge?
A. This was a bill I turned in to Mr. Ronald Morrison for looking after sampling lot No. 1 of the Eulalie.
Q. What is the other paper attached to it?
A. It is a check.
Q. Did you receive the check?
A. Yes, sir; I must have received it, I have endorsed it.

99 COPY PLAINTIFFS' EXHIBIT No. 8.

LEADVILLE, *Jan.* 1/95.

The Eulalia Mng. Co. to James Byrnes, Dr.

To checking moisture and watching the sampling on lot No. 1 Eulalia, 1 day at $3..... $3.00

Perforated. $3.

LEADVILLE, COLO., *Feb.* 26th, 1895. No. 206.

The Leadville savings and deposit bank

Pay to the order of James Byrnes $3.00 three 00/100 dollars.

R. MORRISON.

Leadville savings and deposit bank. Paid Feb. 27, 1895.

[Endorsed:] James Byrnes De Maineville & Brisbane mortg. American nat'l bank Leadville Colo. Paid Feb. 27, 1895 Receiving teller.

100 Q. What is the amount of that check?

Objected to by defendant.

Cross examination by Mr. CAVENDER:

Q. Do you know where the ore came from?
A. No, sir.
Q. Did you see it mined?
A. No, sir.
Q. Did you know from what section of the country it came from?
A. No, sir.

Mr. CAVENDER: We object to the introduction of it.
Objection sustained.

L. S. SMITH being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. What is your name?
A. L. S. Smith.
Q. Where do you reside?
A. Denver.
Q. What was your business connection in the month of December, 1894 and January, 1895?
A. President of the Union Smelting Company.
Q. As president of the company did you have access to the books of the company?
A. Yes, sir.
Q. Have you the smelter settlement book of the Union Smelting Company of date January first, 1895?
A. Yes, sir.
Q. Will you please produce it?
A. This is the book.
Q. Will you turn to the period—will you state if this is a book of original entries of smelter settlements of the Union Smelting Company?
A. Yes, sir; it is.

101 COPY PLAINTIFFS' EXHIBIT No. 10. Folio 21, Smelter Settlement Book Union Smelting Co. and Receipt.

The Union Smelting Company to R. Morrison, mgr., Dr.

1894.
Jan'y 3 For ore settlement Eulalie mine lot 509 / 1..... 111.40

Approved:
W. R. HARP.

LEADVILLE, COLO., *Jan'y 5th*, 1895.

Received of the Union Smelting Company one hundred & eleven 40 / 100 dollars, in full of the above account.

RONALD MORRISON.

(Endorsed:) Union Smelting Co. No. 1555. Leadville, Colo. Jan'y 4 1895. R. Morrison mgr. Eulalie lot 509 / 1

	$ c.
Charge account of R. Morrison mgr.....	111.40
	111.40

Entered folio.

Pl'ffs' Ex. 10.

The Union Smelting Company.

Bought of Eulalie mine.

No. —.

Leadville, Colo., *Jan'y 2d*, 1895.

Lot No.		Name of ore.	Gross lbs.	Per cent. H 2°.	Net lbs.	Assay.				Basis of settlement.				Cost of treatment.	Net price per ton.	Total value.	Freight deducted.	Net value.
Smelter.	Mine.					Ounces gold.	Ounces silver.	Per cent. lead.	Silver loss in smelting.	Per oz. gold.	Per ounce silver.	Per unit lead.	Per unit copper.					
509	1	.....	28050	7²	26030	1	5⁴	.....	5	19	59¾	.....	.....	13 50	$ 56	.....	.....	111 40

Quotations used.					Analysis.								
Mine lot.	Gold.	Silver.	Lead.	Copper.	$Si\ O_2$.	Fe.	Lead.	Excess. $Si\ O_2$.	Excess. Fe.	Ca O.	S.	Zn.	Bas O_4.
509-1	19	59¾	.....	.....	77⁴	10⁷	7-10	.....	.....	.....	667	.....	.....

Received of the Union Smelting Co.

Statement sent

By J. Y. OLIVER.

Settled Leadville Colo., January 2d, 1895.

102 Q. Will you look upon page 21 of that book and state if that is an entry made under your supervision, by your servants or by yourself, for ore purchased for the Union Smelting Company?

A. I don't know exactly.

(Question read to witness.)

A. It is a statement—this page 21, covering what we call a folio, and contains——

The COURT: Don't say what it is; simply if it is a statement made by yourself or employees.

A. Made by the employees of the Union Smelting Company, yes, sir; at that time.

Q. Will you state who it is signed by?

A. J. Y. Oliver.

Q. Will you state the date?

A. January 2d, 1895.

Mr. ELDER: We offer this in evidence as the original book for the purchase of ores from the Eulalie mine.

The COURT: The better way will be that you gentlemen consent that Mr. Smith may make a copy, and that that may be introduced if it is followed up.

Mr. CAVENDER: It is understood of course that we object to it as being incompetent and immaterial.

The COURT: If permissible the understanding is that copies may be substituted.

Mr. ELDER: I desire that with reference to all of our exhibits.

The WITNESS: For the purpose of stating what this is I want to say that it is folio 21 of our settlement book.

The COURT: Of the Union Smelting Company.

Q. Will you please read that smelter settlement?

103 Objected to by defendant.

Mr. ELDER: They can strike the evidence out if we do not follow the ore to the smelter.

The COURT: Unless they will consent you must follow the proper course.

Mr. CAVENDER: We will accept a copy of it if it is properly followed up.

The COURT: Can you make a copy of that statement?

The WITNESS: Oh, yes.

Q. Have you in your possession any paper showing payment to Ronald Morrison for the ore settlement as shown by that book?

A. Yes, sir.

Q. Will you produce that if you please? (Paper produced)

Mr. EWING: I can't see where that can become material.

Mr. ELDER: That is only for identification; we will follow this up.

Paper marked for identification Plaintiffs' Exhibit 9.

Q. Paper shown witness marked Exhibit 9 offered for the purpose of identification; what is that paper, Mr. Smith?

A. It is a check of the Union national bank made to the order of R. Morrison, manager, signed W. R. Hart—Union Smelting Company by W. R. Hart, general manager.

Q. What amount?

A. $111.40.

Q. What is the date?

A. January 4th, 1895. It is dated 1894, but it should have been 1895.

Paper produced and marked for identification Plaintiffs' Exhibit 10 and shown to the witness.

104 COPY PLAINTIFFS' EXHIBIT No. 9 and Copy Stub Ex. No. 9, c'k No. 1295, Union Smelting Company to Ronald Morrison, Manager.

No. 1295. DENVER, COLORADO, *Jan'y 4th*, 1894.

The Union national bank

Pay to R. Morrison, m'g'r, or order $111.40, one hundred & eleven 40/100 dollars in current funds.

The Union Smelting Company.

THE UNION SMELTING COMPANY,
By W. R. HARP, *General Manager*.

[Endorsed:] R. Morrison m'g'r. Credit account of the Leadville savings & deposit bank Leadville, Colo. H. M. Morgan, cashier. Paid Denver clearing house 7/8 '95 Pl'ff' Ex. 9.

No. 1295. 1/4 1895. Order of R. Morrison m'g'r. Eulalie ore 111.40 For No. 509–1

105 Q. State what that is, Mr. Smith?

A. This is a voucher; receipt by Ronald Morrison showing payment for——

Mr. EWING: That is enough to go through the regular course or form of business.

Q. What is the date of it?

A. The receipt is dated there January 5th, 1895.

(Stub book marked Plaintiffs' Exhibit 11 shown witness.)

Mr. CAVENDER: We will agree that they correspond.

Q. Check No. 1295; will you compare the check with the stub and state what they are?

A. Well, this stub 1295 is the stub memorandum of this check 1295 which is marked Exhibit 9.

Q. Mr. Smith, how long have you known Mr. J. Y. Oliver?

A. Why, I don't know really; probably—I knew him probably two or three years before he died.

Q. Did he have the supervision of the purchase of ores at your smelter, the making out of statements, figuring up the settlements?

A. Yes, sir.

No cross examination.

MARK SMITH being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. What is your name?

A. Mark Smith.

Q. Where were you born?

A. In Erie county, Pennsylvania.

Q. Are you related to one of the plaintiffs in this case, Eben Smith?

A. Yes, sir; brother.

106 Q. Will you state if he was a native born citizen of the United States or not?

A. Well, I have always understood that he was born in the United States.

Cross examination by Mr. CAVENDER:

Q. Your brother is older than you are, wasn't he?

A. Yes, sir.

Q. Born before you?

A. Yes, sir.

Q. You don't know where he was born?

A. No, sir.

H. C. MORRELL being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Morrell, what is your occupation?

A. Druggist.

Q. Where do you reside?

A. Leadville.

Q. For the purpose of identification I have six photographs marked Plaintiffs' Exhibit 12; six photographs offered witness and asked if he has ever seen them before. Have you ever seen those before, and are they photographs?

A. They are photographs, and I have seen them before.
Q. Where did you see them?
A. I was the one that made them, took them and finished them.
Q. Are you a professional or amateur photographer?
A. I am an amateur.
Q. How long have you been engaged in amateur photography?
A. About two years and ten months.
Q. Will you state where those photographs were taken and what time?

108 —. They were taken on what we call Preece hill near the Jonny mine on the 7th day of January.

Q. Are they correct representations of the objects photographed?
A. They are exact representations.
Q. When were they taken?

Mr. EWING: He said January 7th of this year.

Cross examination by Mr. CAVENDER:

Q. For what purpose did you take these, Mr. Morrell, at whose instigation?
A. I was asked by Mr. McMillen to do the work.
Q. You were not doing it as an amateur, you were doing it under employment?
A. Yes, sir.

107 PLAINTIFFS' EXHIBIT No. 12,

consisting of six photographs *are* omitted from the bill of exceptions that no issue is raised upon the point that plaintiffs attempted to locate Winter lode No. 427, and defendants admit the use of three of the original Winter stakes in locating their Eulalia lode.

108 LOUIS VIRDEN being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Mr. ELDER: Mr. Virden is subpœnaed under the statute recently passed as an adverse witness.

Mr. CAVENDER: I don't want that statement made to the jury; there is no such statute.

The COURT: When an objection is raised then it will be time enough to state that he was subpœnaed under any special statute.

Q. Mr. Virden, are you a resident of Lake county?
A. I am.
Q. You may state if you were a resident on or about the 26th day of March, 1895?
A. Yes, somewhere around there, yes.

Q. A certified copy of a certain agreement made between Samuel McMillen, party of the first part, and Louis Virden, party of
109 the second part, offered witnesses; will you look at that contract, Mr. Virden, and state what it is?

Mr. CAVENDER: I object to that; he can ask whether he executed it or not; the instrument itself is the best evidence of what it is.
The COURT: Those objections are sustained.

Q. Will you state if you executed that agreement?

The COURT: As to the agreement, that may be objectionable.

Q. Executed that paper?
A. My name is signed here on the copy.

The COURT: Has that paper ever been recorded?
Mr. ELDER: It is a certified copy of a recorded instrument.

A. Yes, I signed this paper; this is a copy.
Q. You may go on and state, Mr. Virden, if you made that agreement for yourself or for other parties.

Objected to by defendant as not an issue in the case.
The COURT: If Mr. Virden signed that and it is an agreement, he certainly made the agreement.
Mr. ELDER: We ask whether he made it for himself or for other parties.
The COURT: Until you offer it in evidence I don't think it is a proper question.
Mr. ELDER: I will offer certified copy of agreement between Samuel McMillen, party of the first part, and Louis Virden, party of the second part.

110 97479. PLAINTIFFS' EXHIBIT No. 13.

This agreement made and entered into on this 26th day of March, 1895, by and between Samuel McMillen, party of the first part, and Louis Verdin, party of the second part, witnesseth:

That whereas said party of the first part claims to own an undivided three-eighths interest in what is known as the Eulalie, an undivided one-half interest in what is known as the Non-Assessable, and also an undivided one-sixth interest in what is known as Comstock Lode mining claims, situate on Breece hill in the county of Lake and State of Colorado, and

Whereas, the said party of the first part heretofore on the 27th day of October, 1894, entered into an agreement with one, John McComb, whereby upon certain conditions to be performed by each of the said parties, the title to the interest in the said Eulalie and the said Non-Assessable would become vested in the said John McComb, and of even date therewith did execute a deed of conveyance

of the said last two interests and deposited the same in escrow in the Leadville savings and deposit bank, and

Whereas, it has been represented by the said party of the first part to the party of the second part that the said agreement has been fully complied with upon his part, and that the said John McComb has failed to carry out the terms of said agreement on his part, and by reason of such failure and default upon the part of said John McComb, the said party of the first part is entitled to and has elected to declare all the rights of the said John McComb in and to said contract and its conveyance aforesaid forfeited, and has demanded of the said bank a return of the said deed, and

111 Whereas, by the terms of the said agreement between the said party of the first part and the said John McCombe, there was to be paid to the said party of the first part the sum of five thousand dollars ($5000) for the said Eulalie and Non-Assessable interests upon which there has been paid to the party of the first part by said John McComb, only the sum of eight hundred and fifty dollars ($850) and that if by virtue of the said agreement the said party of the first part should be compelled to allow the said deed above mentioned to be delivered by the said bank to the said John McComb, there would still be due to the said party of the first part the further sum of four thousand one hundred and fifty dollars ($4150), and

Whereas, said bank has refused to deliver the said deed to the party of the first part, and, in the opinion of the said party of the first part, it has become necessary for him to institute legal proceedings to compel the said bank to deliver the said deed and to have declared the rights of the said John McComb under the said contract forfeited, and

Whereas, the said party of the first part is desirous of procuring title to all of the property above described, and the said party of the first part is also desirous of protecting and saving harmless the said party of the second part and reimbursing him in the cash sum paid under this contract to the said party of the first part,

Now therefore, in consideration of the premises and of the sum of one dollar ($1.00) in hand paid by the said party of the second part to the said party of the first part, the receipt of which is hereby acknowledged, the said party of the second part agrees to pay to the said party of the first part the sum of five hundred dollars

112 ($500) in cash, the receipt of which said sum is also acknowledged, and the said party of the first part agrees to institute the proper legal proceedings for the purposes of having the said deed canceled, and all the rights that the said John McComb heretofore had under the said contract forfeited and held for naught, and to give all necessary aid and furnish all the evidence necessary to that end, and does hereby give to the said party of the second part the right and privilege of taking title to all of the above described property at any time within thirty days after the contract aforesaid shall have been by the said legal proceeding ultimately declared to be

void and the said deed made in pursuance thereof declared to be canceled, and the rights of the said party of the first part in and to the property described in said deed to be reinvested in the said party of the first part, or his assigns other than the said John McComb or his assigns, and it is agreed by the party of the second part that upon his exercising the privilege of taking the title to the interests in the said Eulalie and Non-Assessable that he shall pay to the said party of the first part the further and full sum of four thousand and five hundred dollars ($4500) and a conveyance of said property is this day made by the said party of the first part to the said party of the second part and placed in escrow in the American national bank in the city of Leadville aforesaid, which said deed is to be delivered to the said party of the second part, or his assigns, upon the presentation to the said bank of the evidence of payment of the said sum of four thousand and five hundred dollars ($4500).

It is further agreed upon the part of the party of the first part that in the event the said legal proceedings shall not result in the
113 declaring of the said contract void and the said deed canceled, that the said party of the second part shall have the right to reimburse himself out of the sum of money that may be declared to be due from the said John McComb under said contract to the party of the first part, to the amount of the said sum of five hundred dollars ($500) paid as aforesaid. And this agreement shall operate as an assignment of so much of the proceeds that may be declared to be due under said contract between the said party of the first part and the said John McComb, as may equal the amount of the cash payment aforesaid.

It is further agreed that a separate deed shall be placed in the aforesaid bank in escrow of the said one-sixth interest in and to the said Comstock lode, and the said party of the second part shall have the right to elect at any time between now and thirty days after the determination of the legal proceedings aforesaid, to take the said one-sixth interest in the said Comstock lode in lieu of his aforesaid reimbursement of five hundred dollars ($500) and upon the further payment of the sum of five hundred dollars ($500), and may at any time within the time aforesaid, upon presentation to the said bank of a declaration in writing that he elects to take said deed in lieu of said reimbursement of said sum of five hundred dollars ($500), and upon the payment of said further sum of five hundred dollars ($500), the said bank shall have and is hereby authorized to deliver said deed of the aforesaid one-sixth interest in said Comstock lode to the party of the second part. The balance of this contract as to the Eulalie and the Non-Assessable lodes to remain in full force the same as if such election had not been made and such release shall be in full satisfaction and payment for said conveyance of said one-sixth interest in the said Comstock lode; and

114 It is further agreed that if by the effect of the said legal proceedings it shall be determined that the said John McComb is entitled to any portion of the interest in the said Eulalie

and Non-Assessable lodes under his contract or arrangement with the said party of the first part, that then the said party of the second part may at his election take whatever interest may be left to the said party of the first part upon the payment into said bank, to the order of said party of the first part, a proportionate amount for said interest based upon the price of five thousand dollars ($5000): the said sum of five hundred dollars ($500) paid at this time to be credited thereon.

In witness whereof we have hereunto set our hands and seals on this the day and year first above written.

SAM'L McMILLEN.
LOUIS VERDIN.

Filed for record March 26—1895 at 3.05 o'clock p. m.

J. W. NEWELL, *Recorder.*
H. W. WOODWARD, *Deputy.*

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of agreement No. 97479 as it appears of record in my office, in Book 164, page 61.

Witness my hand and official seal, this 20th day of November, 1899.

H. S. PHILLIPS,
Clerk and Recorder,
[SEAL.] By T. W. JAYCOX, JR., *Deputy.*

(Documentary stamp.)

115 (Endorsed.)

Certified copy. No. 1265. Compared. 97479. Agreement.

STATE OF COLORADO, } ss:
County of Lake, }

Filed for record at 3.05 o'clock p. m. March 26, 1895 and duly recorded in Book 164, page 61.

J. W. NEWELL, *Recorder.*
H. W. WOODWARD, *Deputy.*

Pl'ff-' Ex. 13.

116 Objected to by defendant as incompetent, immaterial and not tending to prove any issues in the cause.

The COURT: State for what purpose you now offer it.

Mr. ELDER: The object of the introduction of this evidence is to show the recognition upon the part of Mr. Charles T. Limberg

one of the directors and officers of the Ferrum Mining Company, of the title to the Eulalie lode, of a $\frac{3}{8}$ interest then owned by Mr. McMillen.

Mr. CAVENDER: It is a most preposterous idea; under the statute of the State there is nothing prior to the commencement of the suit should be introduced in evidence in the first place; in the second place it is certainly a proper thing at any time to object to a conflicting interest if there is one, and under no other issue in the cause could it be introduced in evidence; even if it were connected you have a right to object to a conflicting interest at any time under the statute of Colorado; and it don't establish anything.

The COURT: You cannot introduce that for that purpose. If you have some other object you may state it.

Mr. ELDER: We offer this certified copy of agreement between Samuel McMillen and Charles T. Limberg as a muniment of title of the Eulalie Lode mining claim.

Mr. CAVENDER: I object to it as incompetent and immaterial and not tending to establish any issues and not a muniment of title of the Eulalie Lode mining claim.

And the court sustained said objection; to which ruling of the court plaintiffs by their counsel then and there duly excepted.

117 Q. Mr. Virden, at the time of the date of this instrument were you acting for yourself in the signature and execution of that instrument for yourself or other parties.

Objected to by defendant as incompetent and immaterial.

And the court sustained said objection; to which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. Mr. Virden, did you pay of your own money the sum of five hundred dollars to Mr. McMillen, the first payment named in this contract?

Objected to by defendant on the same grounds.

And the court sustained said objection; to which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. Will you state, Mr. Virden, at the time, on or about, of the execution of this contract whether you entered into negotiations with Samuel McMillen for the purchase of his interest in the Eulalie claim?

Objected to by defendant for the same reason.

And the court sustained said objection. To which ruling of the court plaintiffs by their counsel duly excepted.

Q. Will you state, Mr. Virden if under the terms of the contract which you have identified a deed was placed in escrow in the American national bank to Louis Virden for a three-eighths interest in the Eulalie lode?

Objected to by defendants on the same grounds as before.

And the court sustained said objection. To which ruling
118 of the court plaintiffs by their counsel duly excepted.

Q. Will you state, Mr. Virden, if you claimed any interest or ownership under the contract which you have identified in the Eulalie Lode mining claim?

Objected to by defendant for the same reason as before.
And the court sustained said objection. To which ruling of the court plaintiffs by their counsel duly excepted.

Q. Mr. Virden, will you state if under the contract which you have identified as your contract you have made any further payments under your contract than the first payment of five hundred dollars named in the contract.

Objected to by defendant for the same reason as before.
And the court sustained said objection. To which ruling of the court plaintiffs by their counsel duly excepted.

Q. Will you state, Mr. Virden, if you have any interest in the Eulalie Lode mining claim?

Objected to by defendant as he is not a party here and the issue is not raised and it is immaterial.
And the court sustained said objection. To which ruling of the court plaintiffs by their counsel duly excepted.

No cross examination.

119 JOHN MCCOMBE being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Paper marked Exhibit 14 shown witness and witness asked if that is his signature?
A. Yes, sir.

Mr. ELDER: We offer in evidence original paper, document numbered 95850, affidavit of labor and improvements on the Eulalie lode sworn to by John McCombe on the 31st day of December, 1894, and filed in the recorder's office of Lake county on the 31st of December, 1894 at ten o'clock and 51 minutes.
Said paper is marked for identification Plaintiffs' Exhibit 14, and is received without objection, and is in words and figures as follows, to-wit:

120 PLAINTIFFS' EXHIBIT No. 14.

STATE OF COLORADO, }
Lake County. }

Eulalie lode.

Before me, the subscriber, personally appeared John McComb who, being duly sworn, saith that at least one hundred dollars' worth of work or improvements were performed or made upon the Eulalie lode, situate in California mining district, county of Lake, State of Colorado, between the 1st day of January A. D. 1894 and the 31st day of Dec. A. D. 1894. Such expenditure was made by or at the expense of John McComb *et al.*, owners of said claim, for the purpose of complying with the law and holding said claim.

JOHN McCOMBE.

Subscribed and sworn to before me, this 31st day of December, A. D. 1894. My commission expires February 27th, 1898.

[NOTARIAL SEAL.] H. R. PENDERY,
Notary Public.

STATE OF COLORADO, }
County of Lake, } *ss:*

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of affidavit of labor No. 95850 as it appears of record in my office, in Book 75, page 206.

Witness my hand and official seal, this 20th day of November, 1899.

[SEAL.] H. S. PHILLIPS,
Clerk and Recorder,
By T. W. JAYCOX, JR., *Deputy.*

[Documentary stamp.]

(Endorsed:) Certified copy No. 1264. No. 95850. Compared. Affidavit of labor and improvements. Eulalie lode.

STATE OF COLORADO, }
Lake County, } *ss:*

Filed for record this 31st day of Dec. 1894, at 10:51 o'clock a. m. Recorded in Book 75, page 206.

J. W. NEWELL, *Recorder.*
H. W. WOODWARD, *Deputy.*

Copy Pl'ffs' Ex. No. 14.

121 Q. Paper shown witness marked Plaintiffs' Exhibit 15 for the purpose of identification and witness asked if he signed and swore to the original of which this is a certified copy?

Mr. CAVENDER: One is an exact copy of the other so far as I can see, Mr. Elder; it is for the same year.

Mr. ELDER: It is an exact copy of Exhibit 14, that's right. That is not the paper I intended. Just strike out with reference to Exhibit 15. Paper marked Exhibit 15 by error withdrawn and exhibit mark erased.

No cross examination.

H. R. PENDERY being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Pendery, what is your occupation?

A. Attorney.

Q. Paper marked Plaintiffs' Exhibit 15 shown witness and witness asked if on or about the 26th day of June, 1893, in his capacity as attorney and notary public he prepared a paper, copy of which is shown him, and swore one John Kennedy to the same?

Mr. CAVENDER: We object except to the answer yes or no.

The COURT: That is the only answer that is called for.

A. Yes.

Q. Will you go on and state if having seen that paper, copy of the original, if you have any remembrance of the contents of the paper?

A. Yes, sir.

Q. Were you employed as an attorney and counselor at
122 law by Mr. John Kennedy to prepare that paper?

A. Yes, sir.

Q. What is the paper?

Mr. CAVENDER: Now we object.

The COURT: The paper shows what it is; the objection is sustained.

Q. Paper marked Plaintiffs' Exhibit 16 for the purpose of identification; Mr. Pendery, will you look at this paper and state if the jurat signed by you to the original of which this is a copy, was made by you on the 7th day of August, 1892?

The COURT: I am at a loss to see the reason of identifying these papers in this way. If they are public records they are *prima facie* evidence of that fact without taking up the time to identify the signature and ask the notary when he took a certain jurat. If, when you come to offer it, they controvert the fact that Mr. Pendery was

a notary and that he did take that jurat to overcome the *prima facie* character which attaches to such evidence, then it would be time to introduce Mr. Pendery to prove it.

Mr. ELDER: It has a two-fold object; this affidavit also was prepared by Mr. Pendery as a counselor at law and I wish to have his memory on that subject.

The COURT: You are asking as to the jurat.

Q. I will withdraw that portion of the question and ask him if as counselor at law he prepared that for a certain proceeding in the land office?

A. I think I did, sir.

No cross examination.

123 PLAINTIFFS' EXHIBITS NOS. 15 AND 16,

consisting of copies of affidavits in the cancellation of the Winter lode sur. No. 427 in the U. S. Land Department made by John Kennedy,— no issue being made on the fact, — are omitted from the record.

124 JOHN KENNEDY being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. What is your name, sir?
A. John Kennedy.
Q. Where do you reside?
A. Pueblo, at present.
Q. What is your occupation?
A. I am a book keeper.
Q. Where were you born?
A. In Ireland.
Q. Have you served in the regular service of the United States Army?
A. I have served in the volunteer service.
Q. You have served in the volunteer service of the United States Army?
A. Yes, sir.
Q. Have you taken the oath of allegiance as an officer, soldier?

Mr. CAVENDER: We will concede that he is a citizen of the United States.

Q. Have you made your declaration?

The COURT: If they concede his citizenship what is the use of proving it.

Mr. ELDER: We offer the declaratory statement of John Kennedy

in evidence, certified by the clerk of this court, of his intention to become a citizen of the United States.

Said paper is marked Plaintiffs' Exhibit 17, is received without objection, and is in words and figures as follows, to-wit:

125 PLAINTIFFS' EXHIBIT No. 17.

UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:
County of Lake, }

Be it remembered that personally appeared before me the clerk of the district court of the fifth judicial district of the State of Colorado, within and for the county of Lake, John Kennedy, a native of Ireland, age 21 years, who, being sworn, does solemnly declare on oath that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to every foreign power, prince, potentate, State or sovereignty whatever, and more particularly to the Queen of Great Britain and Ireland, of whom he was heretofore a subject.

JOHN KENNEDY.

Subscribed and sworn to before me, this 27th day of September 1887.

J. H. PLAYTER, *Clerk,*
By GEO. P. BROWN,
Deputy Clerk.

STATE OF COLORADO, } ss:
County of Lake, }

I, John H. Dunn, clerk of the district court of the fifth judicial district, within and for the county of Lake, in the State aforesaid, do hereby certify that the above is a true copy of the declaration of John Kennedy an alien, duly made before J. H. Playter, and filed in my office on the 27th day of Sept. A. D. 1887.

Given under my hand and the seal of said court, this 9th day of November, A. D. 1899.

[SEAL.]

JOHN H. DUNN, *Clerk,*
By JAMES J. CONNELL,
Deputy Clerk.

[Documentary stamp.]

(Endorsed:) No. — Declaration of intention John Kennedy District court Lake county Issued —— — 189– District court Lake county Filed Feb. 7 1900, John H. Dunn, clerk Per —— —— deputy. Pl'ff-' Ex. 17.

126 Q. What was your employment, Mr. Kennedy, on or about the 5th day of January, 1895?

A. I believe I was book keeper in the Leadville savings & deposit bank at that time.

Q. Did you have charge at that time of the balancing of accounts of customers?

A. Yes, sir.

Q. Small book, Plaintiffs' Exhibit 18, shown witness, witness asked if he has ever seen that book before?

A. Yes, sir; I made the entries in this book.

Q. Do you know whose book it is?

A. Yes, sir; Ronald Morrison's.

Mr. ELDER: Book identified as deposit book of Ronald Morrison offered in evidence.

Objected to by defendant as immaterial and incompetent.

Mr. ELDER: We offer the deposit book of Ronald Morrison of the Leadville savings and deposit bank, already identified by the witness, in evidence for the purpose of showing the deposit of a check for $111.40, the check offered in evidence of the Union Smelting Company, dated the 4th of January, 1895 and deposited the 5th day of January, 1895.

The COURT: The check has not been offered in evidence.

Mr. ELDER: The check has been identified.

The COURT: That may be; the admissibility of this may depend upon the admissibility of the check. If the check is ruled out then this would have to be stricken out.

Mr. ELDER: I thought it was the understanding that that check could be stricken out if we didn't follow it up.

127 The COURT: That was ruled out simply because the proper order was not followed I presume, I do not know. The book has been identified, it does not need the presence of the witness to introduce it in regular order. It might be well to withdraw it now, and when it comes in regular order then introduce it in evidence.

Offer withdrawn.

Mr. CAVENDER: We will admit for the purpose of the case every entry in there was made by Mr. Kennedy, and that it shows the truth, that is if it is proper testimony. We are not admitting that it is proper testimony.

Mr. ELDER: That admission is rather general in its form; we prefer to have the evidence in.

The COURT: Very well.

Q. Page shown witness under date January, 1895, one date figure 5 numbers 111.40 and witness asked to state if that is in his hand writing?

A. Yes, sir; I made that entry.

Q. Mr. Kennedy, will you look at that book and state if you have seen it before?

Mr. CAVENDER: We will concede that that is the balance book of the Leadville savings & deposit bank.

Mr. ELDER: Defendants admit that the book shown witness is the deposit book of the Leadville savings & deposit bank, dated January 5th, 1895; is that right, Mr. Cavender?

Mr. CAVENDER: Yes, sir.

Q. Look at unpaged Book 926, name Ronald Morrison, date January 5th, 1895 and state what the book shows?

128 COPY PLAINTIFFS' EXHIBIT No. 18.

Unnumbered page deposit book Ronald Morrison in Leadville savings & deposit bank:

Entry:

1895.
Jan. 5..... $111.40

Also entry in balance book of the Leadville savings & deposit bank, Book 926:

Name.	Date.	
Ronald Morrison.....	Jan. 5, 1895	111.40

129 Objected to by defendant as incompetent; they can prove the book, the competency we object to.

The COURT: You admit the book to be true if this evidence is material. You can introduce it at the right time. It does not need the presence of the witness under the admission they make.

Mr. ELDER: Strike out that question.

Q. Is that entry under date January 5th, 1895 opposite the name of Ronald Morrison in your handwriting?

A. Yes, sir.

Q. Did you make that?

A. Yes, sir; I did.

Q. What are those figures?

A. $111.40.

Q. Were you acquainted with Ronald Morrison?

A. Why, I believe so; I have known Mr. Morrison.

Six checks produced by plaintiffs' counsel.

Mr. CAVENDER: Mr. Maxwell testified that those were Mr. Morrison's signatures; we concede that.

Mr. ELDER: Mr. Kennedy was an officer in the bank.

The COURT: The checks have been identified for the purpose of this trial; counsel on the other side admit that the checks identified there as Plaintiffs' Exhibit 2 consisting of six checks are signed by R. Morrison and that the signature is the genuine signature of Ronald Morrison. That ought to be sufficient and obviate the necessity of this testimony.

Q. Were you familiar with Ronald Morrison's handwriting?
A. Why, to some extent, yes.
Q. Plaintiffs' Exhibit 3 shown witness and witness asked
130 if he knows any part of that paper is in the handwriting of Ronald Morrison and can identify it?
A. I don't know.

Mr. CAVENDER: We make the same admission with reference to the other checks identified by Mr. Maxwell.

Q. Mr. Kennedy, were you the original locator of the Eulalie Lode mining claim?
A. Yes, sir.
Q. Was the location made in your own interest or in other people's interest?
A. Why, I never had any interest in it; in other people's interest entirely.
Q. Your name was used by whom?
A. By John McCombe, Sam McMillen, I really don't know anybody else that was interested, I have forgotten.
Q. Paper shown witness marked Plaintiffs' Exhibit 19 and asked if that is his signature?
A. Yes, sir.

Mr. ELDER: I now offer in evidence mining deed dated the 25th of January, 1894, John Kennedy to John McCombe for one half interest of the Eulalie lode and two other properties, the Chief and the Non-Assessable, properly executed and recorded March 30th 1894. Said paper is received without objection and is in words and figures as follows, to-wit:

131 COPY PLAINTIFFS' EXHIBIT NO. 19.

This indenture, made the 25th day of January in the year of our Lord one thousand eight hundred and ninety-four, between John Kennedy of the county of Lake and State of Colorado, party of the first part, and John McCombe of the county of Lake and State of Colorado, party of the second part;

Witnesseth, that the said party of the first part, for and in consideration of the sum of twenty-five dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release and forever quit-claim, unto the said party of the second part, and to his heirs and assigns: All the following described mining property, to-wit: All the equal undivided one-half (½) part or interest of, in and to the "Chief," the "Eulalie," and the Non-Assessable lodes or mining claims, situate on Breece hill, California mining district, Lake

county, Colorado in and particularly described in location certificates thereof recorded, the first herein described claim, in Book 84, at page 551, and the second, to-wit, the "Eulalie" in Book 84, at page 550, and the third, to-wit, the "Non-Assessable" in Book 115, at page 196 of the records of the county clerk and recorder's office of said Lake county, Colorado.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident,
132 appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN KENNEDY. [SEAL.]

Signed, sealed and delivered in presence of
H. R. PENDERY.

(Endorsed.)

STATE OF COLORADO, } ss:
Lake County, }

I, H. R. Pendery, a notary public in and for said county, in the State aforesaid, do hereby certify that John Kennedy who is personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 27th day of January A. D. 1894. My commission expires February 27th, 1896.

[NOTARIAL SEAL.]

H. R. PENDERY,
Notary Public.

133 (Further endorsed.)

Certified copy No. 1260. No. 93024. Compared.

Mining deed, John Kennedy to John McCombe.

STATE OF COLORADO, } ss:
County of Lake, }

I hereby certify that this deed was filed for record in my office at 12:32 o'clock p. m. March 30th, 1894, and is duly recorded in Book 148, page No. 414.

J. W. NEWELL, *Recorder.*
H. W. WOODWARD, *Deputy.*

(Attached slip.)

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of mining deed No. 93024 as it appears of record in my office in Book 148, page 414.

Witness my hand and official seal this 20th day of November, 1899.

H. S. PHILLIPS,
Clerk and Recorder,
By T. W. JAYCOX, JR, *Deputy.*

[Documentary stamp.]

134 Q. Instrument shown witness marked Plaintiffs' Exhibit 20 and asked if that is his signature?

A. Yes, sir.

Mr. ELDER: We offer in evidence deed dated the 5th of April, 1894, John Kennedy to Samuel McMillen, one dollar and other good and valuable considerations, to an equal one half part of the Eulalie lode and half part of the Non-Assessable lode, situated on Breece hill.

Said deed is received in evidence without objection and is in words and figures as follows, to-wit:

135 COPY PLAINTIFFS' EXHIBIT No. 20.

This indenture, made the fifth day of April in the year of our Lord one thousand eight hundred and ninety four, between John Kennedy of the county of Lake and State of Colorado, party of the first part, and Samuel McMillen of the county of Lake and State of Colorado, party of the second part;

Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar and other good and valuable

considerations to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise release and forever quit-claim, unto the said party of the second part, and to his heirs and assigns, all the following described mining property, to-wit, all the equal one-half part or interest of in and to the "Eulalia" lode or mining claim and also the equal undivided one-half (½) part or interest of, in and to the "Non-Assessable" lode or mining claim both situate on Breece hill, California mining district, Lake county, Colorado. The location certificate of the first described lode as above being recorded in the office of the county clerk and recorder's office of Lake county, Colorado, in Book 84 at page 550, and the second above described lode claim in Book 115 at page 196 of the recorder's office aforesaid,

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed;
136 and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof with the appurtenances.

To have and to hold, all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN KENNEDY. [SEAL.]

Signed, sealed and delivered in presence of

____ ____

____ ____

(Endorsed.)

STATE OF COLORADO, } ss:
Lake County, }

I, Howell V. Morgan, notary public in and for said county, in the State aforesaid, do hereby certify that John Kennedy who is personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this fifth day of April A. D. 1894.

[NOTARIAL SEAL.] HOWELL V. MORGAN,
Notary Public.

Comm. expires Jan. 20th, 1898.

137 (Further endorsed.)

Certified copy No. 1261. No. 93069. Mining deed. Compared. John Kennedy to Samuel McMillen.

STATE OF COLORADO, } ss:
County of Lake, }

I hereby certify that this deed was filed for record in my office at 11:04 o'clock a. m., April 7", 1894, and is duly recorded in Book 148 page No. 423.

J. W. NEWELL, *Recorder.*
H. W. WOODWARD, *Deputy.*

COPY PLFFS' EX. No. 20.

(Attached slip.)

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid do hereby certify that the within and foregoing is a true and correct copy of mining deed No. 93069 as it appears of record in my office, in Book 148, page 423.

Witness my hand and official seal, this 20th day of November, 1899.

H. S. PHILLIPS,
Clerk and Recorder,
[SEAL.] By T. W. JAYCOX, JR, *Deputy.*

[Documentary stamp.]

138 Q. Mr. Kennedy, did you have any conversation with Mr. McCombe and Mr. McMillen about having the use of your name for the purpose of locating this claim?

Objected to by defendant as immaterial.

The COURT: Let him answer that question; put it directly that, Did you consent to the use of your name?

Q. Did you consent to the use of your name?
A. Yes.

No cross examination.

Court here took a recess until 2 o'clock p. m.

GEORGE HOLLAND being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Holland, what is your profession?
A. Civil engineer and surveyor.
Q. Was that your occupation on or about the 30th of May, 1893?
A. Yes, sir.
Q. Will you go on and state if you were employed to do any work on or about that time by Messrs. Jack McCombe and Samuel McMillen?
A. I was employed to survey the Eulalie lode.
Q. Go on and state what you did?
A. I set a stake if there was not any, set a stake at each corner of the claim and the side center stakes, one on the north side and one on the south side with a blaze on the inside towards the claim, marked cor. No. 1 Eulalie lode, cor. No. 2 Eulalie lode, cor. No. 3 Eulalie lode, cor. No. 4 Eulalie lode, north side center stake Eulalie lode, south side center stake Eulalie lode, and I wrote out a
139 notice claiming the Eulalie lode, claiming fifteen hundred feet along the vein, 425 feet running south 78 east 1075 feet running north 78 west, and wrote on John Kennedy, located the 30th day of May, 1893.

Q. Do you know if this ground was previously claimed by other parties at that time?
A. It was formerly known as the Winter Lode survey 427.
Q. What is the vicinity on the surface of the earth, the location you made, what is the neighborhood?
A. It is on Breece hill, the east end of it runs into what was known as the Idado Park claim on Breece hill.
Q. What are the neighboring claims if any?
A. Well, there is the Robert Burns, survey No. 538.

Objected to by defendant as incompetent and immaterial.
The COURT: If you insist on your objection of course it will have to go out. I cannot see the necessity of showing that the Robert Burns lode is in the vicinity at all the question is this particular lode.
Mr. ELDER: The Robert Burns survey is mentioned in this survey.
The COURT: Go on and state.

Q. Go on and state the neighboring claims, you give them in the location certificate.
A. I didn't state all the neighboring claims, I stated one on each side.

The COURT: I don't suppose they will attack the location of this claim.

Mr. EWING: There is no dispute as to what the ground is that is in conflict at all, as I understand it.

140 Q. Go on and state, Mr. Holland, what stakes of the Winter location 427 you used?

A. I used corner 1, corner 4 and corner 3 of the original Winter claim.

Q. Will you state if corners 1, 3 and 4 of the Winter lode were identical with your survey of the Eulalie?

A. Yes, sir; corners 1, 3 and 4 were identical with the survey I was making.

Q. The posts themselves were identical?

A. Yes, sir; the same old stakes marked 1–427, 3–427 and 4–427.

Q. What did you mark on corner No. 1?

A. Corner No. 1 Eulalie lode.

Q. What did you mark on corner No. 2?

A. I had to re-set that; corner No. 2 Eulalie lode.

Q. Did you use an old stake or a new stake?

A. I set a stake there.

Q. What did you place on corner No. 3?

A. Corner No. 3 Eulalie lode.

Q. Four?

A. Corner No. 4 Eulalie lode.

Q. Did you locate a place for a discovery shaft?

A. Yes, sir.

Q. Who was with you on that occasion?

A. Mr. Oliver and Mr. McMillen.

Q. Oliver?

A. Mr. Oliver Kous and Mr. McMillen.

Q. Was there anybody else present during that time at all?

A. Setting the notice, I don't think there was. Part of the time Mr. McCombe was there.

Q. Who employed you to do that work?

A. Mr. McMillen and Mr. McCombe.

Q. Who gave you the name Eulalie?

141 A. Mr. McCombe said his sister named it that, wanted it called that I believe, said his sister wanted to call it that, a name his sister picked out.

Q. This was the 30th of May, 1893?

A. 30th day of May, 1893.

Q. Was there any approved plat of the survey of the Winter lode in the land office?

Mr. EWING: We object as incompetent, immaterial and does not tend to prove any issue in this case.

The COURT: And the further objection that it is secondary evidence. The objection is sustained.

Q. Where did you get your notes, on what location certificate, and he courses and distances you had for the Eulalie lode?

Objected to by defendant as incompetent, immaterial and not tending to establish any issue in this case.

Objection sustained.

Q. Were you asked by Mr. McCombe or Mr. McMillen to relocate the Winter lode?

Objected to by defendant as hearsay.

Mr. ELDER: Declarations of the owners.

The COURT: I am unable to see what difference it makes whether he was asked to do that or not; the question is what was done, what discovery you made, what location you made, how it was done and that sort of thing. The objection is sustained.

Q. Mr. Holland, did you relocate the Winter lode?

A. That was the object in going there.

Q. Do you know a location shaft called the Pocket Liner shaft within the lines of the Eulalie location?

A. I know what is called the Pocket Liner shaft?

COPY PLAINTIFFS' EXHIBIT No. 21. Map of Pocket Liner lode in relation to Eulalia and Winter lodes.

(Here follows blue print marked p. 142.)

143 Q. Have you prepared a map or a plat showing the location of the Pocket Liner, the location certificate, the original location certificate as compared with the Winter survey and the Eulalie survey?

A. I have made a map showing the relative position of the Winter and the Eulalie lodes and the Pocket Liner lode and the Pocket Liner shaft—showing the Pocket Liner shaft.

Q. Will you produce and identify that map?

A. Yes, sir.

Q. Have you it with you now?

A. I think so.

(Map produced.)

Q. Is that the map.

A. Yes, sir; that shows the relative position of the Winter lode—Exhibit 21 shows the relative position of the Pocket Liner location and the Eulalie, survey No. 9234; also the Glengary.

Q. Will you state if you please whether or not the Pocket Liner shaft is within the limits of the survey of the Eulalie lode, survey 9234?

A. Yes, sir; it is.

Q. And that is correctly placed upon that map?

A. Yes, sir; that is placed according to the connection survey on the ground.

Q. Have you prepared, Mr. Holland, copy of an adverse plat of the Eulalie claim against the Golden Rod as filed in the United States Land Office?

A. Yes, sir.

Said plat marked Plaintiffs' Exhibit 22.

Q. Do you identify this as a correct map of the Eulalie Lode survey 9234, of the adverse plat against the Golden Rod survey 9441, United States Land Office?

A. Yes, sir.

Q. Which color is the Eulalie?

A. The pink; the pink is the Eulalie lode, that is the light pink is the Eulalie lode, and the heavy shading on the ground of the Eulalie lode that is in conflict with the Golden Rod lode, and this light blue is the Golden Rod lines where they are not common with the lines of the Eulalie.

COPY PLAINTIFFS' EXHIBIT No. 22. Adverse plat Eulalia lode *vs.* Golden Rod lode.

(Here follows blue print marked page 144.)

145 Q. Will you state how many tracts exist—separate tracts of conflict exist in the adverse?

A. Three.

Q. Will you state the area of each?

Mr. EWING: There is no contest about that I think.

Mr. ELDER: It is admitted that the area in conflict in tract "A" is .165 acres.

Mr. EWING: As far as we know, subject to correction by the surveyor.

Mr. ELDER: Tract "B" the area in conflict is 1.007 acres; tract "C" the area in conflict 2.001 acres.

Q. Mr. Holland, I will ask you to point out the location of your discovery shaft on your map.

A. The discovery shaft of the Eulalie lode is right there.

Q. How far is that distant from the east end line?

A. 400 feet.

Q. How far is it distant from the west end line?

A. 1050 feet.

Q. Is the lines of the Eulalie lode fully 1500 feet or a fractional part?

A. No, sir; a few feet short.

Q. Have you correctly delineated the position of the Pocket Liner shaft on tract "C"?

A. Yes, sir.

Q. The real position of the shaft?

A. Yes, sir.

Q. Were you employed to make the patent survey, U. S. survey 9234, Eulalie lode and Non-Assessable lode?

A. Yes, sir.

Q. You made the patent survey?

A. Yes, sir, most of it. I did not make all.

146 Q. Do you remember the date of the application for patent?

Mr. EWING: Of what?

Mr. ELDER: Of the plat.

The COURT: Why introduce the secondary evidence when these matters are recorded in the land office; what is the use of proving them verbally when you can prove them by documents?

Mr. ELDER: Well, I have all the documentary evidence.

The COURT: Well, that is better; this only takes up time and is liable to objection if they choose to raise it. They will probably admit all of those things if you ask them to.

Q. Mr. Holland, I hand you a photograph and ask you if you can identify in any way the representation upon that photograph? This refers to the photograph made by Mr. Morrell.

Mr. EWING: That is a photograph taken this year?

Mr. ELDER: One of the stakes of the original Winter lode, the one used by Mr. Holland in the survey of May 30th, 1893.

Mr. EWING: We don't doubt but what Mr. Holland's testimony is true with reference to what he did, find these old Winter stakes there, the ones that he said he had. There will be no testimony to contradict that. We will admit that when Mr. Holland said that he found the corners 1, 3 and 4 of the Winter claim there on May 30th, 1893, that that is a fact.

The COURT: And that he marked them again with the name Eulalie?

147 Mr. EWING: Yes, we have no doubt of it.

The COURT: Have you photographs of all the stakes?

Mr. ELDER: This is the only photograph with the stake 427 in view?

Mr. EWING: We don't know that the stake is the same as it would have been May 30th, 1893, or seven years prior.

Q. Mr. Holland, will you state if you scribed the marks upon that stake that you found in January, 1890, corner No. 4, 427, Winter lode, the scribe marks are the same upon stakes No. 1 and No. 3?

A. Did I find these on here?

Q. When you saw the other stakes in 1893?

A. This was No. 4.

Q. Were the other stakes marked the same?

A. They were apparently the same as near as I can recollect; they appeared to have been marked by the same person. I don't remember exactly whether they all resembled, I think they did though some.

Q. Was there any peculiar method of marking those stakes?

A. Oh, no; after I get accustomed to one man's marking I could tell them. I believe I could tell who marked them; after seeing that stake, if I went to corner No. 1 and the same man marked it, I think I could tell whether the same man marked it. But they were all properly scribed.

Q. How is that mark usually made upon the stake?

A. I think that was made with a knife; very often they are made with a scribe.

Q. I show you another photograph of stakes; do you remember using that stake?

The COURT: Is this one of the stakes in the admission?

Mr. ELDER: Yes, sir.

148 The COURT: Can't you rely on the admission they have made and let the rest of them go?

Mr. ELDER: Yes, but the admission is not that the particular north side line stake is standing on the ground now; the admission went to 427.

The COURT: What difference does it make whether it is standing on the ground now?

Mr. ELDER: It doesn't make any difference, only we want to show that that ground was staked.

Q. Do you remember anything about that north side line stake?
A. No, I don't remember just the stake; I don't remember what kind of a stake I drove there six or seven years ago. I know the stakes were set.

Cross examination of Mr. Holland by EWING:

Q. You were up there on the 30th of May, 1893, and made the location of the Eulalie, were you not?
A. Yes, sir.

Plaintiffs offer Exhibit 23, a certified copy of the location certificate, dated the 30th of May, 1893, date of certificate June 15th, 1893, date of recording June 17th, 1893; recorded in Book 84, page 550.

149 COPY OF PLAINTIFFS' EXHIBIT No. "23."

Book 84, page 550, document # 90853.

STATE OF COLORADO, }
County of Lake, } ss:

Know all men by these presents, that John Kennedy the undersigned, has this 30th day of May 1893, located and claimed, and by these presents do- locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Eulalia lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits, and surface ground, within the lines of said claim 425 feet running S. 77° 30′ E. from center of discovery shaft, and 1075 feet running N. 77° 30′ W. from center of discovery shaft, said discovery being situate upon said lode, vein, ledge or deposit, and within the lines of said claim, in California mining district, county of Lake and State of Colorado, described by metes and bound as follows, to-wit:

Beginning at corner No. 1 a pine post, being identical with cor. No. 1 of sur. No. 427 Winter lode. Thence N. 12° 30′ E. 300 feet to cor. No. 2, a pine post. Thence N. 77° 30′ W. 750 feet to side center stake 1500 feet to cor. No. 3, a pine post. Thence S. 12° 30′ W. 300 feet to cor. No. 4, a pine post. Thence S. 77° 30′ E. 750 feet to side center 1500 feet to cor. No. 1, place of beginning. Variation 14° 40′ east.

150 This claim is situated on Breece hill adjoining claims U. S. surveys No. 427, 538, 471, and 504.

JOHN KENNEDY. [SEAL.]

Said lode was discovered on the 30th day of May, A. D. 1893.
Attest: —— ——.

Date of location May 30th, A. D. 1893.
Date of certificate June 15th, A. D. 1893.
Filed for record the 17 day of June A. D. 1893 at 9:35 o'clock a. m.

C. H. S. WHIPPLE, *Recorder*,
By R. O. NORTH, *Deputy*.

Endorsed: 90853. Copy. Location certificate. On the Eulalia mining claim of —— in —— mining district —— county State of Colorado.

(Attached slip.)

STATE OF COLORADO, } ss:
County of Lake, }

I, J. W. Newell, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of location certificate No. 90853, as it appears of record in my office, in Book 84, page 550.

Witness my hand and official seal this 17th day of January 1895.

J. W. NEWELL,
Clerk and Recorder,
By R. O. NORTH, *Deputy*.

[SEAL.]

Mr. CAVENDER: We desire to make the formal objection that it should be stricken out when the proper time comes if they haven't proved a discovery of mineral and so on.

The COURT: Do you desire now to announce that you will when the proper time comes object to it?

151 Mr. CAVENDER: Certainly, if they do not prove a discovery and the proper work etc.

The COURT: Do you object now, or reserve the objection until later?

Mr. CAVENDER: We will reserve it until later.

Mr. EWING: Let it go in subject to any objection we may make as to that.

The COURT: No objection made as to form?

Mr. EWING: No.

By Mr. ELDER:

Q. After examining that copy, Mr. Holland, will you state if you made the original of which that is a certified copy?

A. Well, that answers the description of the claim as I know it. I think that is a copy of what I wrote out as the original.

Q. Will you state if corner No. 1 by its post, being identical with corner No. 1 survey 427 of the Winter lode is a prominent monument?

A. Certainly is a public monument.

The COURT: You can have full leave in rebuttal to contradict anything of that kind, provided they contradict it; until they do contradict it I don't see the necessity of taking up the time.

Q. Just one question, Mr. Holland; the four surveys mentioned as adjoining claims, 427, 538, 504 and 471 are well known patent surveys?

A. All well known claims; yes, sir.

Q. What are they?

A. 538 Robert Burns; 471 Eclip; 504 Little Bertha; 427 is the Winter.

By Mr. EWING:

Q. Who was with you you say?

152 A. Oliver Kous, Sam McMillen, and Mr. McCombe was there part of the time.

Q. You picked out this place for the discovery shaft?

A. Yes, sir.

Q. Mr. McMillen was with you?

A. Yes, sir.

By Mr. ELDER:

Q. When you were at the Pocket Liner shaft was there anything said by any of the parties present, specially Mr. McMillen one of your employers, as to the presence of mineral in that shaft?

Objected to by defendant.

Objection sustained. To which ruling of the court plaintiffs by their counsel then and there duly excepted.

W. L. G. SMITH being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Smith, what is your occupation?

A. Mining engineering.

Q. What was your occupation along about October, November and December and January, 1894 and 1895?

A. Mining engineering.

Q. Were you employed along in about that time to survey along the lines of the Little Vinnie lode what is known as the Eulalie lode?

A. I was.

Q. Who by?

A. Ronald Morrison.

Q. Will you state if you have made a correct map of the under ground workings of the Eulalie lode on the side line of the Little Vinnie lode?

A. I did.

Q. Have you such a map?

A. Yes.

153 Q. Is this the map, sir?

Mr. CAVENDER: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalie claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words a discovery in one claim cannot be made through the workings of another, that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

The COURT: It might be well to get the map in; it has not been marked as an exhibit yet.

Mr. CAVENDER: I am making the objection now so as to save the record.

Said map marked for identification Plaintiffs' Exhibit 24.

COPY OF PLAINTIFFS' EXHIBIT No. 24. Map of workings made by plaintiffs in the south-east fraction of the Eulalia lode from the 380 ft. level of Little Vinnie.

(Here follows blue print marked page 154.)

Mr. ELDER: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalie lode from the under ground workings of the Little Vinnie lode.

Second. We offer that in case of the working of the Eulalie lode and the shipping of ore or the discovery of mineral in either
155 the drift or the stopes above the drift during the period of the year 1894, that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of this claim upon the ground. And in support of that proposition I desire to call the court's attention to a case within the last year heard in your honor's court in which a discovery was made under ground from the Price shaft and in which I believe Mr. Esty was interested, and which discovery was made under ground from a shaft formerly upon the conflicting location.

The COURT: Connected to the surface through their ground in that case, if I remember.

Mr. ELDER: So there is a connection through the Little Vinnie shaft.

The COURT: But not through Eulalie ground. You should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work, and you should offer it next to prove a discovery.

Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it
156 is intended to constitute the discovery. In other words you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

The COURT: I hold most emphatically this, that you can not have a secret or concealed discovery from an opening on another claim or on Government land.

Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

The COURT: There was nothing as far as I see the evidence now, I may be mistaken; this particular part which you point out which appears to be colored light blue, you have shown no opening from the Eulalie ground connecting with that drift.

Perhaps I can explain the position to you in this way: Suppose I

had been walking over the Eulalie claim with the idea of seeing what there was on the ground, believing it to be vacant unoccupied domain; that drift might have existed there, and undoubtedly did exist three hundred or four hundred feet under ground, and yet it would not give me the slightest notice. There must be some-
157 thing on the ground to give notice of a discovery to constitute a discovery.

Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property?

The COURT: What I hold, Mr. Elder, at this time is that you cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalie ground unless you show an opening or visible connection with the surface of the Eulalie ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

Mr. ELDER: I would like the court to pass on the assessment work.

Mr. EWING: We will concede they did a hundred dollars' worth of work within the boundaries of the claim in the year 1894.

The COURT: Then you don't need any offer on that point.

Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the under ground workings of the Little Vinnie claim?

The COURT: Unless you can show an opening to the surface of the Eulalie claim.

To which ruling of the court plaintiffs by their counsel
158 then and there duly excepted.

Mr. ELDER: Plaintiffs make another offer considered in connection with the other two offers; plaintiffs offer the map Exhibit 24 for the purpose of proving five hundred dollars' worth of work within the lines of the Eulalie claim to come within the statute on the application for patent and the rules of the United States Land Office.

Mr. EWING: We object; that is not material in this case. It can only become material if they should get a verdict and make an entry in the United States Land Office, and that is always made by affidavit.

The COURT: It would not constitute proof in the land office; it is immaterial in this case whether you have done ten dollars' worth of work so long as you have done your assessment work. I rule that you cannot take up the time of the court to prove sufficient work to obtain a patent in this case.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Mr. ELDER: Plaintiff- offers Exhibit 24, map of the under ground

workings of the Eulalie lode on the 380 foot level of the Little Vinnie for the purpose of proving the expenditure of a thousand dollars upon the claim during the year 1894.

Mr. EWING: We object because it has been admitted that the annual assessment work was done, and anything more would
159 be simply surplusage and not material.

The COURT: I think on that admission the objection will be sustained. You can show by that map or any competent evidence that the assessment work was done; but they have admitted the assessment work and that is the only material point.

M. M. MCINNES being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. What is your occupation?
A. Miner.
Q. Where have you mined in this camp?
A. Mined up on Breece hill.
Q. Where were you mining in December, 1894?
A. On the Little Vinnie.
Q. Are you familiar with the under ground workings of the Little Vinnie?
A. Yes, sir; part of it.
Q. Are you familiar with what is known as the 380 foot level of the Little Vinnie?
A. Yes, sir.
Q. Do you know of any work having been done from that level towards the Eulalie lode claim in the fall?
A. We have an upraise, we have a stope there in that level.
Q. Did you see any ore on the line of the Eulalie lode—common line of the Little Vinnie and the Eulalie lode?

Objected to by defendant.

The COURT: What is the purpose of it?
160 Mr. ELDER: We are going to prove we shipped ore from that ground.

The COURT: They will perhaps admit that you did.

Mr. EWING: No, we will not admit that; but this comes under the same objection.

And the court sustained said objection. To which ruling of the court plaintiffs by their counsel duly excepted.

The COURT: The court has already decided that such a drift does not constitute a discovery.

FRANK H. JONES being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. You have been sworn, Mr. Jones?
A. Yes, sir.
Q. What is your occupation?
A. Mining engineer.
Q. Are you acquainted with the Eulalie lode upon Breece hill in this county?
A. To some extent.
Q. Are you acquainted with what has been desinated the Pocket Liner shaft of the Eulalie lode on Breece hill?
A. Yes, sir.
Q. Have you made a map of the Eulalie lode with reference to the Pocket Liner shaft?
A. I have.
Q. Have you made a map showing the lines of the original location of the Pocket Liner lode claim as compared with the lines of the Eulalie lode claim?
A. Yes, sir.
Q. Will you produce the same?

Map produced and marked for identification Plaintiffs' Exhibit 25.

COPY of PLAINTIFFS' EXHIBIT No. 25. Map of workings in Pocket Liner shaft.

(Here follows blue print marked p. 161.)

162 Q. Is this the map?
A. It is.
Q. Will you state what is the scale of that map, sir?
A. 20 feet to the inch; it is given there on the map.
Q. Will you state if the location of the Pocket Liner shaft is correctly delineated upon that map with reference to the corners of the Pocket Liner shaft original survey?
A. Yes, sir.
Q. And the corners of the Eulalie lode 3 and 4, original location?
A. Yes, sir.
Q. Will you state if the drifts delineated upon the map are correctly represented as they occur under ground?
A. As surveyed by me; yes, sir.
Q. Will you state what is the length of the drift colored yellow running apparently to the north?
A. Well, I will have to refer to my note book; it is given there according to the scale. I don't remember the figures.
Q. What is the length of the drift if you know?
A. I prefer to refer to my note book.
Q. Yes, get your note book.
A. The upper drift as shown here is 39.05 feet from the edge of the shaft to the breast.
Q. What is the distance of the drift from the surface, collar of the shaft?
A. 114.25 feet from the collar of the shaft to the bottom of the drift.
Q. State what is the length of the lower drift?
A. 45.15 feet from the edge of the shaft to the breast.
Q. Will you state what is the depth to the lower level?
A. 136.6 feet from the collar of the shaft to the bottom.
Q. Will you state the length of the drift?
A. 45.15 feet.
163 Q. Are those measurements along the center line of the drift?
A. As near as may be, approximately.
Q. Did you measure the sawed timber of the shaft from the collar to the round timbering, the first round timber in the shaft?
A. Yes.
Q. What is that depth?
A. The sawed timbering extending from the bottom of the shaft?
Q. No, from the top of the shaft.

The COURT: What is the purpose of this, what has the timbering to do with it?

Mr. ELDER: The timbering has to do with it, the work, the Golden Rod assessment work consisted for five years of 64 or 65 feet of timbering in the Pocket Liner shaft, from the collar of the shaft was 64.9 feet is new timbering, sawed timber.

Q. What is the size of that timber at the points?
A. Four feet two by eight feet eight 25.3 feet down from the collar.
Q. Go on, sir, from that point down?
A. From that point down it is contracted about one foot in length.
Q. What is the next distance to the bottom of the sawed timber?
A. 39.6 feet.
Q. What is the interior size of that portion of the shaft?
A. Four by eight.

The COURT: If you will permit a suggestion, it occurs to me if this evidence as to this timbering is simply with reference to the assessment work done on the claim, to have been done on the
164 Pocket Liner shaft, that it is matter of rebuttal on your part rather than original evidence, and anticipating their testimony.

Mr. ELDER: It is to save bringing Mr. Jones here again; and also I have the additional purpose of showing the depth of this shaft in the levels.

Q. Go on and state what is the character of the next timbering down until the bottom of the old round timbers; what is the distance from the upper sawed timbers to the bottom of the round timbers?
A. 40.1 feet.
Q. What is the distance from the lower round timbering in the shaft to the bottom of the lower drift?
A. Eleven feet and seven inches.
Q. What kind of timbering is that?
A. It is sawed, four by eight.
Q. What is the interior dimensions of that?
A. Three by five.
Q. You have already stated that the Pocket Liner shaft is within the limits of the Eulalie survey, have you?
A. Yes, sir; as shown there.

No cross examination.

W. W. DAVIS being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Davis, are you connected in any way with the Golden Eagle Mining Company?
A. Yes, sir.
Q. Is the Golden Eagle the successor in any way of the
165 Legal Tender Mining Company?
A. Depends on what you call the successor it owns the property that the Legal Tender used to own.

Q. Have you in your possession the original transfer stock book of the Legal Tender Consolidated Mining Company?

A. I have a book that purports to be so, yes.

Q. Have you the original certificate books of the Legal Tender Consolidated Mining Company?

A. You mean the stock certificate book?

Q. I mean the stock certificate book?

A. Yes, I believe so.

Q. Will you please produce them?

A. Here are the stock certificate books beginning with one and extending to about a thousand I believe it is.

Q. From whom did you receive those certificate books, Mr. Davis?

A. These I found in the office of the Golden Eagle Mining Company.

Mr. CAVENDER: We will admit they are the books of any company you choose, the Golden Eagle or Legal Tender or either one.

Q. Will you turn to page 0 of the transfer of Legal Tender Mining——

A. You mean the alphabetical index?

Q. The first page in the book?

A. Yes.

Q. Will you state what appears upon line four of the page designated purchasing capital?

Mr. CAVENDER: What is the date of that?

A. 1881.

Mr. EWING: We desire to object to any evidence; our objection is that any question of what had been done or who had owned this Pocket Liner shaft or the ground that was covered by that cannot be material.

166 Mr. ELDER: We have produced the books of the Legal Tender Consolidated Mining Company for the purpose of proving that Mr. Samuel McMillen received one thousand shares of the capital stock of the Legal Tender Consolidated Mining Company of the twenty thousand shares issued by that company for the purchase of the Pocket Liner claim.

The COURT: Is this a suit in equity as well as an ejectment suit?

Mr. ELDER: I will explain a little; I want to say to your honor that under the laws for the location and discovery of mining claims in the United States and the State of Colorado and the mining States of the United States the fact of a discovery of ore by a locator in a claim in which he was interested ten or twelve years before is a practical compliance with the statutes of the United States; and we will follow this up by proving an uninterrupted line of decisions by such remarkable judges as Judge Sawyer of the United States circuit court of Nevada and Judge Hawley, that knowledge either on the part of the original discoverer of ore in the shaft, or if he was not an owner in the original claim, that his knowledge is equal at the

date that he places his stake upon the ground to a discovery by the actual working upon the lode itself. And that is the object of the offer to show that Mr. McMillen owned one-eighth interest in the Pocket Liner claim; that ore was discovered in that shaft
167 seventy-five or eighty feet in the shaft and continued down to the first level 113 or 114 feet deep to the westward in that shaft.

The COURT: If that is the ultimate object of this testimony why don't you prove a discovery first and then get all this evidence in if it is material afterwards?

Mr. ELDER: We will identify the books and then do that.

The COURT: The Eulalie claim is the claim you are claiming under; where is the discovery in that claim? Prove your discovery in that claim, that is the first step to a valid title; let us have that step taken if we can, then perhaps we can let all of this in if it is not immaterial.

THOMAS H. THOMPSON being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Thompson, where were you born?
A. I was born in Ireland.
Q. From what parentage?
A. My parents was born at Inverness, Scotland.
Q. How long have you been in this country?
A. About 35 years.
Q. How long have you been in the State of Colorado?
A. About 29 years—28.
Q. What occupation have you pursued in life?
A. Principally mining.
Q. Are you acquainted with the section of the county known as Breece hill?
A. Yes, sir.
Q. Where did you first mine in this State?
168 A. In Fremont county at the Hardscrabble mining district.
Q. What year was that?
A. That was in 1872.
Q. Where did you mine subsequent to that?
A. Well, in—after that in Rosita, and after that at Francis coal bank, at Francisville near Colorado Springs, then in Leadville, since then in Cripple Creek and in Bonanza.
Q. Did you ever mine in Park county?
A. Yes, sir.
Q. Where at?
A. At the Russia mine on Mount Lincoln.
Q. When did you come to Leadville first?

A. I was in California gulch in 1872, in the spring of 1872, and in the fall I went to the Hardscrabble mining district.

Q. Were you one of the original locators of the Pocket Liner claim?

A. Yes, sir; I located the Pocket Liner claim.

Q. Who were the locators of the claim, who were the first owners of the property?

A. Frank McGuire, Terrance Connors, Charles Slavin and myself.

Q. Anybody else any interest in these claims?

A. There was supposed to be two silent partners in the claims.

Q. Who were they?

A. James Joyce and Sam McMillen.

Q. Will you go on and state who did the location work of the Pocket Liner claim?

Objected to by defendant as incompetent, immaterial and not tending to establish any issue in this case.

The COURT: State the purpose.

Mr. ELDER: The details of locating the claim.

The COURT: Is that the only claim interested?

Mr. ELDER: That is the original claim within the lines of which this discovery was made.

169 The COURT: I sustain the objection, unless Mr. Elder has a further and better reason. I don't see the materiality of any evidence with regard to the Pocket Liner claim; that is not in issue in this case. If you can show me the materiality of it I shall be glad to have you do so.

Q. Mr. Thompson, are you familiar with the lines of the Glengary Lode claim?

A. I was at that time; I had a half interest in the Glengary claim.

Q. That is this claim along here?

A. Yes, sir.

Q. You owned a half interest in the Glengary claim?

A. Yes, sir.

Q. You know the lines of the Glengary claim?

A. I did at that time, knew them well, and located the Pocket Liner at the side line of the Glengary.

Q. What side line?

A. At the north side line.

Q. Will you state what you found in that shaft in the year 1879?

Objected to by defendant as incompetent, immaterial and not tending to prove any issue in the case.

The COURT: Let us hear from you, Mr. Elder, why you want to show what was in that shaft.

The jury were thereupon excused for 30 minutes.

Mr. ELDER: The proposition of the plaintiffs is simply this, that

Mr. McMillen as an owner and a locator of the Eulalie lode knew at the time he placed his stake upon the Eulalie claim on the 30th of May, 1893, that he in company with the co-owners of the Pocket Liner claim had discovered ore in the shaft of the Pocket
170 Liner claim. That at the moment that he placed his stake upon that ground claiming the Eulalie claim as abandoned and unoccupied territory that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc.

The COURT: I cannot agree with you. Our statute is clear as to what is required and it has become almost elementary. You must go either upon the vein and make your discovery, or you must go into the shaft in which the vein has already been discovered and do some work.

The objection will be sustained.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Mr. ELDER: In the absence of the jury I want to make another offer. I want to make an offer of proof, I think in October or November, 1895 of ten feet of work on the vein in the Pocket Liner shaft, the annual labor and work of the year 1895 and prior to any discovery on the part of the defendants in this case, because they have no discovery.

The COURT: If you first make proof of your discovery, then you can make proof of the annual assessment work; but you
171 cannot make proof of annual labor until you make proof of a discovery.

Mr. ELDER: Does your honor hold that because these gentlemen make the assertion that in the first place we are not entitled to use the original discovery of 1879 and 1880, and then when we come along to the fall of 1894 and attempt to prove the shipment of ore, and then when they have admitted that the annual assessment was done in this drift——

The COURT: I cannot submit to an interrogation upon a hypothetical question.

Mr. ELDER: Well, that we cannot come and prove another discovery in 1895?

The COURT: That is another proposition. You asked leave to prove your annual assessment work in this Pocket Liner shaft in the year 1895.

Mr. ELDER: And in the doing of that annual assessment work we drove ten feet on that vein.

The COURT: I understand that to mean that that was your annual assessment work. If you propose to prove by that a discovery in 1895 say so.

Mr. ELDER: I ask to be allowed to prove that while doing our annual assessment work in that shaft we made a discovery of ore, and that that would relate back to the date we placed our stake.

The COURT: You can prove this if possible, any discovery which you have made on that ground, I care not where it is, or in
172 what shaft it is, if you have made a discovery prove it.

Mr. ELDER: The court then agrees with me——

The COURT: I am stating a bare fact, I am not committing myself on hypothetical questions; what I said is this, if in 1895 you made a discovery upon that ground and you claim under that discovery, you may go to work and prove your claim under that discovery.

Mr. ELDER: Note an exception to the last ruling of the court.

The COURT: Do you mean the ruling on the objection on which this argument arose originally?

Mr. ELDER: Yes; the exception has already been entered to that ruling.

J. J. GREEN being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Green, what is your full name?
A. John J. Green.
Q. How long have you resided in Lake county?
A. A little over twenty years.
Q. Did you do any work within the lines of the Eulalie Lode mining claim sometime in the fall of 1895?
A. Yes, sir.
Q. Whereabouts did you do that work?
A. 113 or 114 feet from the collar of the shaft.
Q. What did that work consist of?

Mr. CAVENDER: I wish you would ask the question who he worked for.

173 Q. Who did you work for?
A. Mr. Sam McMillen.

Mr. CAVENDER: We object to any further testimony on the ground because at the time that the work was done as alleged any other work done at that time was in disregard of an injunction issued by this court against the plaintiffs in this case, and they cannot use any work or anything done at that time which was done in disregard and contempt of court in this case. January 19, 1895, is the date of the injunction.

The COURT: I want to ask the witness: What do you mean by 113 or 114 feet from the collar of the shaft?

A. I mean down in depth.
Q. You mean down this very identical shaft?
A. Yes, sir.

Q. You went down this shaft 113 or 114 feet to do this work you were asked about?

A. Yes, sir.

The COURT: You could not take possession of that shaft in violation of the injunction. I could not allow you to show work on that shaft during the pendency of this injunction. The objection is sustained.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. Mr. Green, did you do any work within the lines of the Eulalie claim at the close of the year 1897 and the fore part of the year 1898?

A. Yes, sir; I did.

Q. Where did you do that work if any?

A. In the year 1897?

Q. No, 1898 and 1899; end of the year 1898 and the year 1899?

Q. Well, I done that work down the shaft also in that same drift.

174 Objected to by defendant for the same reason as before. And the court sustained said objection. To which ruling of the court plaintiffs by their counsel duly excepted.

Q. Mr. Green, did you do any work within the lines of the Eulalie claim in the month of November, 1899?

A. Yes, sir.

Q. Who did you do that work for?

A. Well, I done that for Sam McMillen.

Q. Where did you do that work?

A. I done it down 113 or 114 feet down the shaft, same drift.

Objected to by defendant on the same ground as before.

The COURT: You don't object to his stating where the work was done?

Mr. EWING: No.

Q. How far did you do that work from the shaft?

A. In 1899?

Q. In 1899; what distance were you in from the side of the shaft?

The COURT: Well, it is down the shaft?

A. Yes.

Objected to by defendant.

Q. What kind of material or rock did you work in?

Objected to by defendant; it is an attempt to initiate a title.

And the court sustained said objection. To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. What kind of material did you take out of that shaft at the period you worked there in driving that drift?

Objected to by defendant; objection sustained.

Q. Did you see a vein, lode or ledge of mineral rock in place and did you work upon the vein of mineral bearing precious
175 metals in the course of that work?

Objected to by defendants. Objection sustained.
To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. If this work in the drift was done upon a vein, lode or ledge, in what direction did this vein, lode or ledge dip?

Objected to by defendant. Objection sustained.
To which ruling of the court plaintiffs by their counsel then and there duly excepted.

No cross examination.

STEPHEN CONNORS being called as a witness for the plaintiffs and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. What is your name?
A. Stephen Connors.
Q. What is your occupation?
A. Well, I am a blacksmith and miner.
Q. Did you ever get any assays down what is known as the Pocket Liner shaft?
A. Yes, sir.
Q. Within the limits of the Eulalie Lode mining claim sometime in the fall or winter of 1879 or 1880?
A. I got an assay, yes.
Q. Did you receive a card from the assayer when you——
A. Yes, sir.
Q. Have you that card in your possession?
A. I haven't got it now, I did at the time of receiving it and for some years.
Q. Will you state when you last saw that card?
A. Well, I don't recollect the card since about 1883 or 1884.
176 Q. Have you made a search for that card among your papers?
A. Yes, sir.
Q. Have you found it?
A. No.
Q. Do you remember parting with the possession of that card to anybody?
A. I don't recollect parting with it.
Q. Have you made such a thorough search as to believe at this time that that card is lost?
A. Yes, sir.

Q. Will you state, if you remember, what were the contents, not the number of ounces; will you state whether that assay showed the presence of gold and silver within that rock that you gave to the assayer?

Objected to by defendant for a great many reasons, the first one is what occurred 1879 is immaterial.

And the court sustained said objection. To which ruling of the court plaintiffs duly excepted.

Q. Were you one of the owners of what is known as the Pocket Liner claim?

A. In 1877?

Q. In 1879 or in 1880 or at any time?

A. Yes; I got my deeds sometime in November, 1879.

Objected to by defendant.

The COURT: The answer of course is yes.

Q. Did you know of the ownership of Samuel McMillen?

A. No, sir.

Q. At that time did you know of the ownership by Samuel McMillen of a part interest in the Pocket Liner claim, at any time since the location of that claim in 1879?

Objected to by defendant as incompetent and immaterial.

177 And the court sustained said objection. To which ruling of the court plaintiffs duly excepted.

Mr. ELDER: We want to introduce in evidence the final naturalization certificate of Samuel McMillen.

Mr. EWING: We will admit the citizenship of Mr. McMillen in May, 1893.

Mr. ELDER: I want to introduce in evidence the final naturalization certificate of Ronald Morrison.

Mr. EWING: We will admit that he was a citizen of the United States on the 30th of May, 1893.

Mr. ELDER: Now, if your honor please, the defendants in this case have not attacked in their pleadings the doing of the annual assessment work upon the Eulalie Lode mining claim, and it is not necessary at this time for us to establish that work, the burden of proof being upon them to establish it later on.

Now, I understand the ruling of the court is confined now to refusing to allow us to claim the validity of this location under the discovery of the Pocket Liner shaft in 1879 and 1880, refusing to allow us——

The COURT: The court is not disposed to answer that question; the record shows the condition of the case.

Mr. ELDER: Well then, the plaintiffs will rest.

Court here adjourned to the hour of nine o'clock a. m. of February 9th, 1900.

178 W. L. G. SMITH being recalled as a witness for the defendant, testified as follows:

Direct examination by Mr. EWING:

Mr. ELDER: In reference to the admission of defendants with reference to the acts of location at the close of our case yesterday, do I understand that defendants admit all the acts of discovery?

Mr. EWING: We admit that the stakes were put up at the points that Mr. Holland testified to.

Mr. ELDER: Nothing about the discovery shaft?

The COURT: Nothing at all. You cannot first prove a location until you prove a discovery.

Q. I believe you are a civil and mining engineer?

A. Yes, sir.

—. And were such in 1894?

A. Yes, sir.

Q. I will ask you if you ever did anything for Mr. Limberg or Mr. Esty with reference to attempting to locate a claim on Breece hill known as the Golden Rod?

Mr. ELDER: We object to any testimony with reference to the Golden Rod Lode mining claim, and I want to ask Mr. Smith a question before making my objection.

By Mr. ELDER:

Q. Mr. Smith, are the Mr. Esty and Mr. Limberg mentioned by Mr. Ewing the president and secretary of the Golden Eagle Mining Company in 1894, or directors and stockholders?

A. I don't know.

Q. Were you employed by the Golden Eagle Mining Company at that time?

A. No; I was employed by Ronald Morrison of the Golden

179 Chain Leasing Company.

Plaintiffs object to proof of location and discovery of the Golden Rod Lode claim; first, that the defendants have not proved that the ground attempted to be located was unoccupied, unappropriated, vacant mineral land of the United States subject to entry by them.

The COURT: This question calls for a simple yes or no answer. It is not what did you do? Answer that question simply yes or no.

To which ruling of the court plaintiffs duly excepted.

A. I did.

Q. What did you do, just state?

Plaintiffs object to any proof of location and discovery of the Golden Rod Lode mining claim for the following reasons:

1. The defendants have not proved that the ground attempted to

be located was unoccupied, unappropriated and vacant mineral land of the United States and subject to entry by them.

2. The entry of defendant's grantors upon the premises already in the actual possession and occupation of the plaintiffs and their grantors under their prior location as the Eulalia Lode mining claim for the purpose of performing the acts necessary to constitute a location and possession amounts only to a trespass and cannot form the basis for the acquisition of title.

3. That defendant's grantors Robert B. Esty and Charles
180 T. Limberg as individuals were and are estopped by the fact that the Legal Tender Consolidated Mining Company of the Golden Eagle Mining Company, of which company said Esty and Limberg were respectively president and secretary and directors and stockholders of both companies, were owners at that time, January 25th, 1894, of the Pocket Liner Lode mining claim covering a large portion of said territory and premises, the abandonment of which claim has never been shown, and that as such officers and stockholders they could not create or initiate an adverse title to that already existing and hostile to and in prejudice of those stockholders of the Legal Tender Consolidated Mining Company and Golden Eagle Mining Company, unless it is shown that these acts were done in the interest of these two companies as against said Esty and Limberg and The Ferrum Mining Company the defendant herein.

4. A co-tenant in a mining claim cannot assail or destroy the common title.

The COURT: It is understood that this is to be followed up by proof that this was unoccupied, unappropriated domain.

Mr. EWING: It was admitted that the Pocket Liner had been abandoned by these companies and had been vacant a good many years.

The COURT: The objection is overruled with the under-
181 standing that this proof must be followed up by proof that the ground was locatable ground at the time of the attempted location to which the witness is going to testify.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

(Question read to the witness)

A. I located the Golden Rod lode.

Q. State what you did?

A. Set the corner posts and side centers and located the discovery shaft.

Q. Well, what did you do with reference to the stakes, what did you put on them?

A. Put on the name and number of the stake—name of the lode and number of the stake.

Q. On each of the corners and at the side?

A. On each of the corners and at the side.

Q. What kind of stakes did you use?

A. I used the old Winter stakes that were standing there, as well as I remember there were two of them standing at the time, and I used pieces 2 x 4 set for the other corner.

Q. What did it show with reference to the original Winter corner?

A. The location certificate stated that it was identical with the Winter corners, survey No. 427.

Objected to by plaintiffs; the location certificate will show for itself.

The COURT: The answer is not responsive.

Q. What did it show on the ground with reference to the original location of the Winter claim as to identity?

A. It showed to be the same, the corner numbers were the same identically.

Q. Did it cover the same ground?

A. Covered the same ground.

182 Q. You located the place for the discovery shaft, did you?

A. I did.

Q. Was a discovery shaft sunk, if you know?

A. It was.

Q. How deep?

A. I am not sure whether I measured it before, I am not sure that I measured it.

Q. Well, how deep do you say it was?

A. I think that it was ten feet deep.

Q. What notice was put up at the discovery shaft?

A. The ordinary form of location notice.

Q. Just state what that was, Mr. Smith?

A. Well, I don't remember.

Q. Well, as near as you can?

A. Claimed 1500 feet of that lode, so many feet running north 77 45, I believe it is, west, and so many feet south 77 45, and 150 feet on each side, with the names of the locators.

Q. Who was that?

A. Charles T. Limberg and Robert B. Esty.

—. Was the date on it?

A. The day that the stake was set.

Q. What day was that?

A. It was January 25th, I think.

Q. What year?

A. 1894.

Q. Was there any claim name upon the stake?

A. The Golden Rod.

Q. Was that placed at the point where the shaft was sunk?

A. It was placed just west—well, it was placed—it was right where the center of the hole should be.

Q. When the shaft was sunk what was done with the stake?

A. Well, I left the stake standing there.

Q. You were back again?
A. I went back again and found another hole and the stake was gone.
183 Q. You found another hole; what do you mean by that?
A. There was another hole instead of the hole that we had dug.
Q. A stake was placed there on the 25th of January?
A. A stake was placed there on the 25th of January.
Q. I will ask you if you made out a location certificate?
A. Yes, sir.
Q. Examine that and state whether or not that correctly states the description of the ground that you staked at that time (showing witness paper)?
A. Yes, sir.
Q. Does that correctly describe the ground that you staked at that time?
A. It does.

Said paper marked Exhibit "A" and offered in evidence by the defendant.

184 COPY OF DEFENDANT'S EXHIBIT "A."

STATE OF COLORADO, } ss:
County of Lake, }

Know all men by these presents: that Charles T. Limberg and Robert B. Esty the undersigned have this 25th day of January 1894, located and claimed, and by these presents do locate and claim by right of discovery and location, in compliance with the mining act of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurements on the Golden Rod lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits, and surface ground within the lines of said claim 1100 feet running N. 77° 30′ W. from center of discovery shaft and 400 feet running S. 77° 30′ E. from center of discovery shaft said discovery shaft being situate upon said lode, vein, ledge or deposit, and within the lines of said claim in California mining district, county of —— and State of Colorado, described by metes and bounds as follows, to-wit: Beginning at cor. No. 1 identical with cor. No. 1 sur. No. 427 thence N. 12° 30′ E. 300 ft. to cor. No. 2. Thence N. 77° 30′ W. 750 ft. to side center stake. 1500 ft. to cor. No. 3. Thence S. 12° 30′ W. 300 ft. to cor. No. 4 identical with cor. No. 4 sur. No. 427. Thence S. 77° 30′ E. 750 ft. to side center state. 1500 ft. to cor. No. 1 the place of beginning.
Va. 14° 30′ E.

185 Said lode was discovered on the 25th day of January A. D. 1894.

CHARLES T. LIMBERG. [SEAL.]
ROB'T B. ESTY. [SEAL.]

Attest: W. L. G. SMITH.

Date of location Jan. 25th A. D. 1894.
Date of certificate Jan. 26th A. D. 1894.

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid do hereby certify that the within and foregoing is a true and correct copy of loc. certificate No. 92630 as it appears of record in my office, in Book 133, page 6.

Witness my hand and official seal, this 24th day of January, 1900.

[SEAL.] H. S. PHILLIPS,
Clerk and Recorder,
By A. LEPPEL, *Deputy.*

[Documentary stamp.]

Endorsed.

Location certificate on the Golden Rod mining claim of Chas. T. Limberg, in California mining district, Lake county, State of Colorado.

STATE OF COLORADO, } ss:
County of Lake, }

I hereby certify that this location certificate was filed for record in my office, at 9:5 o'clock a. m., Jan'y 29th 1894, and is duly recorded in Book 133 at page 6.

Fees $1.00.

J. W. NEWELL, *Recorder,*
By H. W. WOODWARD, *Deputy.*

183 Plaintiffs object to the introduction of the location certificate of the Golden Rod claim, for the reason,

1. That the location certificate recites that said lode was discovered on the 25th of January, 1894; there has been no proof up to the present time of the discovery of a lode within the limits of the survey set forth in this claim.

2. That there is no sufficient or accurate description of this property by metes and bounds within the location certificate to identify the ground, no reference to permanent monuments.

3. That at the time of the location of the Golden Rod Lode mining claim part of the premises within the limits of the at-
186 tempted location was the property of the Golden Eagle Mining Company or of the Legal Tender Mining Company, of

which companies Mr. Limberg and Mr. Estey were directors and stockholders and officers.

4. That at the time of the entry of Charles T. Limberg and Robert B. Esty of part and portion of these premises Messrs. Charles Slavin and Thomas Walsh were in possession of the shaft upon these premises and were working the same.

The COURT: The objection is overruled, with the understanding that the evidence will be followed up with proof of a discovery.

To which ruling of the court plaintiffs duly excepted.

Q. I will ask you if survey 427 was a permanent monument upon the ground, the stakes of it?

A. Two of them were there I know.

Q. Was that a United States survey?

A. It was a United States survey.

Q. I will ask you to state whether or not if from this description the ground could be located upon the ground?

A. It could.

Cross examination of Mr. Smith by Mr. ELDER:

Q. Mr. Smith, you said that you posted a discovery notice at the place as located for this discovery shaft of the Golden Rod claim?

A. I did.

Q. Did you drive this stake into the ground?

A. I don't really know whether it went into the ground or not; there was considerable snow there.

Q. How deep was the snow?

A. I don't know that exactly; probably two or three feet deep.

187 Q. How long was the stake?

A. I don't remember.

Q. Didn't you pound this stake down into the ground, or did you stick it in the snow?

A. Why, my assistant drove it down, I don't know whether he drove it or shoved it down as far as it would go.

Q. Was the ground frosted?

A. It probably was.

Q. Did he have an axe along?

A. I don't know sir.

Q. Will you swear that that stake on which was tacked the location notice was driven to in the ground or stuck into the snow?

A. I couldn't say. It was substantially enough to have staid there.

Q. What day did you first commence the survey of this ground?

A. The 25th of January, 1894.

Q. What time of the day?

A. I don't remember.

Q. What time did you finish the work, about what time in the day did you stick this stake with the notice on?

A. I don't remember that. I finished the survey that same day.
Q. Who gave you orders to make the survey?
A. Mr. Limberg.
Q. Had you been engaged in the location of fractions for Mr. Limberg?
A. I had.
Q. For how long?
A. I don't remember that.
Q. When did you first receive the name Golden Rod lode from Mr. Limberg?
A. Most probably had been the day before.
Q. Do you remember what time in the day before?
A. No, I don't.
Q. Do you remember what you were doing the day before, the 24th of January?
A. I do not.
Q. Do you think it was as early as eight o'clock in the morning the day before that you received the name Golden Rod from
188 Mr. Limberg?
A. I don't know.
Q. Do you think it was as late as eight o'clock in the evening?
A. It might have been earlier than that; might have been two or three days before.
Q. What is your best recollection with reference to that?
A. I really don't remember anything about it.
Q. Did you have a list of names to locate mining claims in from Limberg and Esty?
A. No, I don't think I did.
Q. What is your recollection with reference to when the name Golden Rod was given you, is it that it was the night before or a long time previous?
A. My recollection would be—I would judge that it was given me the day before or the night before.
Q. Did you see Mr. Limberg the evening of the 24th of January, 1894?
A. I am not sure whether I did or not. I saw him pretty near every evening, before doing something or after doing something for him?
Q. Were you upon the ground on the 26th day of January?
A. I don't think that I was.
Q. Were you upon the ground upon the 27th day of January?
A. I don't think I was.
Q. Were you upon the ground on the 28th day of January?
A. I don't think so.
Q. Were you upon the ground upon the 29th day of January?
A. I was.
Q. What time in the day were you upon the ground Monday the 29th day of January, 1894?
A. I don't know at what time in the day.

Q. I will show you a calendar of the year 1894 and I will
189 ask you what was the day the 25th of January, 1894?
A. Thursday.
Q. What day was the 29th of January, when you were upon the ground?
A. Monday.
Q. Can you give the time of day you were upon the ground and saw this shaft and another shaft together?
A. I don't recollect what time of day it was; I don't know whether it was morning or noon.
Q. You said that you didn't measure that shaft?
A. I didn't say that I did not, but I don't remember whether I did or not.
Q. But you believe the shaft was ten feet deep?
A. I believe it was.
Q. What was the depth of the other shaft?
A. The other shaft was about ten feet deep.
Q. Which one of those shafts was fullest of earth?
A. The Golden Rod shaft was fullest at the time.
Q. Were they both about the same in the amount of earth in the bottom of the shaft?
A. Well, there was no loose dirt in this new shaft, it had been cleaned out.
Q. On the 25th of January, Mr. Smith, did you see the second shaft that you have spoken about in your testimony?
A. I did not.
Q. Was it so opened on the 29th of January that you could have discovered it?
A. It had been worked in the day before or the night before.
Q. But there was dirt in the bottom of the new shaft?
A. There was dirt in the bottom of the Golden Rod shaft.
Q. Was there any evidences of a fire having been about the surface of the Golden Rod shaft?
A. No, I don't remember any.
Q. Was there any mineral in the Golden Rod shaft?
190 A. No, there was none.
Q. What was it sunk in?
A. Sunk in wash.
Q. What was the other shaft sunk in?
A. It was in wash too.
Q. What was the distance between the shafts?
A. I should judge there was about two feet.
Q. What portion of the Golden Rod claim—are you familiar with the lines of the Eulalie Lode claim?
A. The location I understand is identical with the Winter.
Q. Are these two shafts in proximity of the old Winter discovery shaft?
A. Just below the dump of the old Winter discovery.

Q. Will you state the points of the compass with reference to the two shafts; which is further south-east or north-west?

A. The new shaft was to the east of the old Winter shaft.

Q. To the east of the old Winter shaft?

A. Yes.

Q. South-east?

A. A little south-east.

Q. Now, with reference to the position of the two shafts where was the Golden Rod shaft?

A. The Golden Rod shaft was the one furthe-st north of the two.

Q. What was the position of the other shaft?

A. It was south of the Golden Rod.

Q. In which direction was the greatest length of the Golden Rod shaft?

A. They were both practically north and south.

Q. Both north and south; was there a trail near these shafts?

A. Yes, there was a trail passing just to the north of them.

Q. On the 29th of January, 1894, did you see any stakes at either of those shafts?

A. Please repeat that.

Q. On the 29th of January, 1894, did you see any stakes at or about either of those shafts?

191 A. No, I did not.

Q. You stated in your direct evidence that the card on the stake that you placed upon there on the 25th of January was not in sight?

A. Yes, sir.

Q. Mr. Smith, is there anything peculiar about the original Winter stakes, survey stakes?

A. Why, no; nothing very peculiar.

Q. Was the method of scribing the patent stakes different from ordinary?

A. Yes, is was in that they were double lined instead of *l*ingle lined.

Q. How were they scribed?

A. They were double lines.

Q. I mean what numbers were upon, say stake number one?

A. Corner number one; 1 with a dash and 427. Corner number four was 4 with a dash and 427. Those are the only two corners I remember being there, those were there; corner number two I know was not there; number three I am in doubt about, I don't remember whether it was there or not.

Q. Mr. Smith, you have sworn that there were no marks on stake No. 1 and stake No. 4, the old Winter stakes, except the scribe marks?

A. None that I could identify.

Q. Were there any pencil marks of any kind upon those two stakes at the time you examined them on the 25th of January 1894?

A. I could see none.

192 CHARLES T. LIMBERG being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. Full name?
A. Charles T. Limberg.
Q. Were you a citizen of the United States on the 25th day of January, 1894?
A. Yes, sir.
Q. You were over twenty-one at that time?
A. Yes, sir.
Q. Did you send Mr. Smith up on Breece hill with reference to this Golden Rod claim?
A. Yes, sir.
Q. About what date?
A. Why, I can't recollect except from the papers, about January 25th, 1894.
Q. To locate this ground?
A. Yes, sir.
Q. Did you know of any other location around there?
A. I knew of the old Winter location, that's all.
Q. Did you know that that had been abandoned?
A. Yes, sir.
Q. As far as you knew it was vacant, unclaimed ground?
A. Yes, sir.

Mr. ELDER: We object to his answer to his knowing of its being abandoned, unless proof is made of his knowledge of that ground.

The COURT: They propose to follow this up, I suppose.

Mr. CAVENDER: We claim all land alleged in this complaint to be unoccupied land of the United States, as a matter of law it is presumed to be vacant, and if it is not vacant then the person in possession must bring an adverse suit to test that.

The COURT: The question arising now is not a question of
198 law, it does not go to the question whether of not this was vacant ground; assuming for a moment that there is no doubt about it, Mr. Limberg testified to his knowledge of it. Mr. Elder's objection as I understand it goes to the question of Mr. Limberg's knowledge.

Mr. ELDER: I object to Mr. Limberg answering that the ground was abandoned unless they show that he had knowledge of that ground.

The COURT: Your objection is overruled, with the privilege to cross examine upon that subject.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. What was done after this location was made, by you or by anyone for you, with reference to working on the claim?

A. There was a ten foot hole put down, ten and a half rather, they told me at the time.

Plaintiffs object to anything told him.

Mr. EWING: Yes, that is not proper evidence.

Q. But what was done with reference to leasing the property?

A. I made a lease.

Objected to by plaintiffs on the ground that the leasing of property by a locator who has failed to comply with the United States statutes and the statute of the State of Colorado with reference to the discovery of mineral is a mere paper title and that of a trespasser, and can create or initiate no title unless it is followed up by evtdence showing that Mr. Limberg and Mr. Esty had a direct
199 interest in the lease and contributed of their money, work and labor to the development of this property.

2. Part of the premises contained in this attempted location was at this time, without abandonment being shown, the property of the Golden Eagle Mining Company or the Legal Tender Consolidated Mining Company, of which companies these two gentlemen were officers, directors, president and secretary.

3. That the Pocket Liner shaft upon the northwestern portion of the premises contained within the Golden Rod location was then in possession of Messrs. Charles Slavin and Thomas Walsh, and one of those gentlemen was then a stockholder of the Legal Tender Consolidated Mining Company, the owner of the property.

4. That unless the evidence is followed up by change of the possession from that of Thomas Walsh and Charles Slavin to that of Charles T. Limberg and Robert B. Esty by some other method than the mere claim of a lease of a location upon which no discovery of ore has been made prior to the lease, it is a void lease and can incept no title.

But the court overruled said objection.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

(Question read to the witness)

A. I leased the property to Mr. Slavin and Mr. Walsh.

200 Objected to by plaintiffs.

The COURT: I allow this evidence with reference to the lease with the understanding that it is to be connected with a discovery.

Q. I will ask you to examine that paper and state who signed it if you know?

A. It is signed by Mr. Esty and myself, Thomas Walsh and Charles Slavin.

Said paper marked for identification Exhibit "B" and offered in evidence by defendant.

193 COPY OF DEFENDANT'S EXHIBIT "B."

95047.

This agreement of lease, made this thirtieth day of January in the year of our Lord, one thousand eight hundred and ninety-four between Robert B. Esty and Charles T. Limberg, lessor- and Thos. Walsh and Charles Slavin, lessee- or tenant-.

Witnesseth, that the said lessors, for and in consideration of the royalties, covenants and agreements hereinafter reserved, and by the said lessees to be paid, kept and performed, have granted, demised and let, and by these presents do grant, demise and let, unto the said lessees, all of the following described mine and mining property, situate in California mining district, county of Lake and State of Colorado, to-wit:

The Golden Rod lode, situate on Breece hill and more fully described as follows:

Beginning at cor. #1. survey No. 427 thence N. 12° 30′ E. 300 feet to cor. #2. thence N. 77° 30′ W. 1500 ft. to cor. #3 thence S. 12° 30′ W. 300 feet to cor. No. 4, thence S. 77° 30′ E. 1500 ft. to cor. #1 the place of beginning, but expressly excepting and excluding all that portion of ground embraced in surveys Nos. 471, 538, 3613, 504, 3007 and 716.

Together with all the appurtenances.

To have and to hold unto the said lessees for the term of — from date hereof, expiring at noon on the — day of —— A. D. 189– unless sooner forfeited or determined through the violation of any covenant hereinafter against the said tenant- reserved.

But it is agreed that the lessors are not to be held in any manner for warranty of title to said premises.

194 And in consideration of such demise, the said lessees do covenant and agree with said lessors, as follows, to-wit:

To enter upon said mine or premises, and work the same mine fashion, in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible, with due regard to the development and preservation of the same as a workable mine, and to the special covenants hereinafter reserved;

To work and mine said premises as aforesaid steadily and continuously from the date of this lease, and that any failure to work said premises with at least two persons employed underground, for the total number of 15 days, in any calendar month, may be considered a violation of this covenant;

To well and sufficiently timber said mine at all points where proper, in accordance with good mining; and to repair all old timbering wherever it may become necessary;

To allow said lessors and their agents from time to time to enter upon and into all parts of said mine for purposes of inspection;

To not assign this lease or any interest thereunder, and to not sub-

let the said premises, or any part thereof, without the written assent of said lessors, and to not allow any person not in privity with the parties hereto to take or hold possession of said premises, or any part thereof, under any pretense whatever;

To occupy and hold all cross or parallel lodes, spurs, or mineral deposits of any kind which may be discovered by the said lessees, or any person under them in any manner, within 150 feet of the center line of said lode, as the property of said lessors, with privilege
195 to said lessees of working the same as parcel of said demised premises;

To keep at all times the drifts, shafts, tunnels and other workings thoroughly drained and clear of loose rock and rubbish unless prevented by extraordinary mining casualty;

To do no underhand stoping, and to make all shafts — feet long by — feet wide in the clear, and all drifts 6′ *feet* high by 3½ feet wide in the clear;

To deliver to said lessors, as royalty, 25 % *per cent.* of the net smelter value of all ore extracted from said premises; to & including 30.00 net smelter returns 35 % on all ores valued over 30.00 and including 50.00 net smelter returns and 45 % on all ores netting over 50.00 net smelter returns;

To deliver to said lessors the said premises, with the appurtenances and all improvements, in good order and condition, with all drifts, shafts, tunnels and other passages thoroughly clear of loose rock and rubbish, and drained, and the mine ready for immediate continued working (accidents not arising from negligence alone excusing) without demand or further notice, on said 30th day of July A. D. 1896 at noon, or at any time previous, upon demand for forfeiture;

And finally, that upon the violation of any covenant or covenants hereinbefore reserved, the term of this lease shall, at the option of said lessors, expire, and the same and said premises, with the appurtenances, shall become forfeited, to said lessors, and said lessors or their agent, may thereupon, after demand of possession in writing, enter upon said premises and dispossess *of* all persons occu-
196 pying the same, with or without process of law, or at the option of said lessors the said tenants and all persons found in occupation may be proceeded against as guilty of unlawful detainer;

And the said lessors expressly reserve to themselves the property and right of property in all mineral to be extracted from said premises during the term of this lease.

Each and every clause and covenant of this agreement of lease, shall extend to the heirs, executors, administrators and lawful assigns of all parties hereto.

In witness whereof, the said parties have hereunto set their hands and seals.

ROBERT B. ESTY. [SEAL.]
CHARLES T. LIMBERG. [SEAL.]
THOS. WALSH. [SEAL.]
CHARLES SLAVIN. [SEAL.]

Sealed and delivered in presence of
W. L. G. SMITH.

Filed for record November 9, 1894, at 10:30 a. m. Book 159, page 352.

J. W. NEWELL, *Recorder*,
By R. O. NORTH, *Deputy*.

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid do hereby certify that the within and foregoing is a true and correct copy of agreement of lease No. 95047 as it appears of record in my office, in Book 159, page 352.

Witness my hand and official seal this 1st day of February 1900.

[SEAL.] H. S. PHILLIPS,
Clerk and Recorder,
By A. LEPPEL, *Deputy*.

[Documentary stamp.]

197 Endorsed.

Certified copy 1381. 95047. Agreement of lease.

STATE OF COLORADO, } ss:
County of Lake, }

Filed for record at 10:30 o'clock a. m. Nov. 9, 1894 and duly recorded in Book 159, page 352.

J. W. NEWELL, *Recorder*.
R. O. NORTH, *Deputy*.

Fees —.

Copy of Defendant's Exhibit B.

200 Plaintiffs object to the introduction of the lease from Robert B. Esty and Charles T. Limberg to Thomas Walsh and Charles Slavin for the following reasons:

1. On the first page of said lease it appears that there is no term specified for the duration of said lease; that the third paragraph, the printed portion of the first page of said lease reads as follows: "To have and to hold unto the said lessees for the term of — from date hereof expiring at noon on the — day of ——, A. D. 189–."

2. The giving of a lease upon property not owned or possessed by virtue of a compliance with the statutes of the United States and of the State of Colorado, specially upon a lode mining claim in which no discovery has been made, can incept or initiate no title.

3. On the face of this lease appears in writing in the third paragraph written upon the face of the lease, "But it is agreed
201 that lessors are not to be held in any manner for warranting title to said premises;" that defendants are estopped by the recital on the face of this lease from claiming that they are or were at the time of the execution of this lease the owners and in possession of this property.

4. That unless these gentlemen follow up the giving of this lease by proof of their contribution of work, labor or money to the development of this leased premises, any discovery of ore made under the terms of this lease cannot inure to make a discovery upon this property.

The COURT: The ruling of the court is that the objection is overruled with the understanding that it is to be followed up by proof of a discovery.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. I will ask you what was done by Slavin and Walsh or their associates after that with reference to this lease?

A. They went to work in the shaft, as I recollect, and continued sinking and driving.

Q. What shaft?

A. The shaft of the Golden Rod, the upper shaft, which has been called here the Pocket Liner shaft.

Q. Did they report to you from time to time with reference to what they were doing?

A. Yes, sir.

Q. Who did that?

A. I think both; I used to meet them both, one time one man and another time another.

Q. Any others?

A. Yes, Mr. Bonner and Mr. King at one time.

Q. How long did they continue work, if you know, I mean
202 the first time, if there was any cessation?

A. I think it was until fall, fall of that year.

Q. Well, what was there with reference to a cessation when the water came in, if any?

A. There was an intermission in the spring time when the surface water was coming in, and they told me about it and asked whether they could stop until the water receded and I think I granted them the right.

Cross examination of Mr. Limberg by Mr. ELDER:

Q. Mr. Limberg, at the time of the location of the Golden Rod Lode mining claim were you connected with the Golden Eagle Mining Company?

A. Yes, sir.

Q. In what capacity?

A. Stockholder.

Q. Had you no other official connection?

A. Not that I remember.

Q. Were you not secretary of that company?

A. At one time—no, let's see, I am in doubt about that. I did hold an official position at one time, but I think it was vice president or treasurer I know it was not secretary.

Q. Did you not six days before the 25th day of January, 1894 sign a lease to Messrs. Slavin and Walsh for the north six hundred feet of the Carlton and Golden Eagle claims as secretary of the Golden Eagle Mining Company?

A. Not that I know, Mr. Elder; you would have to show me the paper.

Q. Do you know anything about such a lease being given?

Q. I knew of the existence of a lease; yes, sir.

Q. Do you know of the reasons given by Slavin and Walsh for applying for that lease?

A. Which lease do you mean?

Mr. CAVENDER: We object to that as immaterial and incompetent.

203 Mr. ELDER: It would be possible for the plaintiffs to establish the fact that on or about the 19th day of January, 1894, Mr. Limberg with other officers of the Golden Eagle Mining Company gave and granted a lease to Slavin and Walsh to the north end of the Carlton and Golden Eagle mining claims and Slavin and Walsh proceeded to the shaft of the Pocket Liner claim; and it is to ascertain from Mr. Limberg why and how those gentlemen were in possession of the Pocket Liner shaft at the time of the location of the Golden Rod claim and that the Pocket Liner claim was then the property of the Legal Tender Company and Golden Eagle Company.

The COURT: We may just as well end this now as to be bothered with it. The objection is sustained, and the court rules that no evidence as to the relations of the Golden Eagle Company or any other lessees or claimants to this property or parties not parties to this action may not be inquired into in this case.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. Mr. Limberg, when did Mr. Walsh and Mr. Slavin first apply to you for a lease on the Golden Rod claim?

A. I don't remember the exact date, but from the lease I should judge it was the day it was written.

Q. Not from the lease, from your own memory, sir

A. I could not say.

Q. Did they ever apply to you for a lease on the Golden Rod claim?

204 A. Yes, sir.

Q. Do you say the day?

A. I can't remember. I can refresh my memory, but I presume you will not permit it.

The COURT: You may refresh your memory if you desire to, sir. The lease is in evidence and it is the best evidence.

The WITNESS: It was on the 30th day of January or a day prior to it that I first met them.

Q. Do you remember the day prior to it?
A. No, I do not, except it was the 29th.
Q. Was it the date of the location of the Golden Rod claim, the 25th of January?
A. No, sir; subsequent to that.
Q. Had you any conversation that day with Messrs. Slavin and Walsh?
A. Which day, the 25th or the 29th?
Q. The 25th of January, 1894?
A. Not that I know of.
Q. Did you have any conversation with them in relation to that lease the day before, the 24th day of January, 1894; did you see Mr. Walsh on that day?
A. Not that I know of.
Q. Did you see him on the 23d day of January?
A. I can't remember.
Q. Do you know where they were at that time?
A. I do not.
Q. Did you see them on the 26th day of January?
A. Not that I know of.
Q. Did you see them on the 27th day of January?
A. I can't say.
Q. Or either of them?
A. I can't say.
Q. Did you have any conversation with them on Saturday the 27th day of January with reference to this lease on the Golden
205 Rod claim?
A. I cannot recollect it; I might have had a conversation with them a day or two days prior to the signing of the lease, but it must have been very shortly prior to the time we made the lease.
Q. Did Mr. Walsh come to your bank on the 27th day of January, 1894 to discuss this matter with you?
A. I don't know; I don't know whether he came to the bank, whether he met me at the corner by the bank or whether I met both of them; I think I met them in the bank or at the corner of the bank.
Q. On what day?
A. Why, from the lease I see the date of the lease, the day prior to it, or one or two days prior to it.
Q. Isn't it a fact that on the 29th day of January, the date of the location certificate of the Golden Rod Lode claim, you met Mr. Walsh and that you agreed to give him a lease the next day, the 30th of January, if he would come to your house you would have the lease to deliver to him?
A. That may be; I think the lease was signed at my house.
Q. Now, Mr. Limberg, you have testified in your direct examination that you did not know that this ground was claimed by anybody else?
A. Yes, sir.

Q. That it was unoccupied, abandoned property?
A. Abandoned property, yes, sir.
Q. Did you ever hear of the Eulalie Lode mining claim?
A. I did not at that time.
Q. When did you first hear of that claim?
A. I think I heard that Sam McMillen claimed that ground,—it must have been, say around the 28th or 29th. It was several days after our location.

Q. Do you remember through whom you gained that
206 knowledge?

A. I think I gained it through Mr. Smith and Mr. Hopkins. At one time Mr. McMillen came to me, whether that was at this time or later, I can't say, he came to me and made a claim there.
Q. Whereabouts?
A. Well, he claimed that same ground that we claimed.
Q. What is your best recollection about that—the time?
A. I couldn't say.
Q. Was it on the 26th day of January, 1894?
A. I wouldn't say, Mr. Elder.
Q. Was it the 27th day of January?
A. I wouldn't say.
Q. Didn't it occur in your bank about two o'clock in the afternoon of the 27th day of January, 1894?
A. I couldn't say that it did occur——

The COURT: What is the motive of inquiring into these hours and minutes?

Mr. ELDER: The motive is to show that Mr. Limberg knew that there was a location of the Eulalie claim.

Q. Is it a fact, Mr. Limberg, that on the evening of Saturday the 27th day of January, 1894 you instructed Mr. W. L. G. Smith to go upon that ground of the Golden Rod claim even if there were Eulalie stakes upon that ground?
A. I think, Mr. Elder, I asked Mr. Smith to look around; now what date it was I couldn't say, I think it was a day or two after our location and before I signed this lease, somewhere within that time, and I think I instructed Mr. Smith then to go upon the ground and look around.
Q. Do you have any remembrance of Mr. Thomas Walsh coming down to you prior to the 25th day of January, 1894 and
207 notifying you that Mr. McMillen claimed that ground?

Q. Do you remember at any time making the remark to Mr. Walsh to not mind about Samuel McMillen, that he was crazy and claimed the whole hill and that you would fix it?
A. Mr. Elder, I think I made a statement similar to that at one time after we heard that Sam McMillen claimed that ground; I think I said Sam must be crazy, he is trying to claim the whole hill, something to that effect.

The COURT: I think you have gone into that far enough.

Q. You said Mr. Hopkins also spoke to you about it?
A. Mr. Hopkins spoke to me at one time about it.
Q. About what time was that?
A. I can't say.

The COURT: It doesn't make any difference what Mr. Hopkins did, it has nothing to do with this case.

To which ruling of the court plaintiffs duly excepted.

Mr. ELDER: I want to ask Mr. Limberg and I want to submit the question to the court so that we can get along; Mr. Limberg has testified that the ground was abandoned and unoccupied, and we want to carry home to Mr. Limberg through Mr. Hopkins that he had notice of the existence of the Eulalie claim before the location certificate was recorded.

The COURT: That would have been all very well had you preceded it with proof that there was a Eulalie claim, which you have not done in this case; therefore your testimony is irrelevant, or rather your examination is irrelevant.

208 Mr. ELDER: Note an exception to the overruling of plaintiffs' request to the court to be allowed to interrogate this witness as to notice of the existence of the Eulalie Lode mining claim given to Mr. Limberg by Joseph Hopkins.

Q. Mr. Limberg, how much did you pay for the sinking of the discovery shaft of the Golden Rod claim?
A. I couldn't say now, Mr. Elder; I could look it up on my books.

The COURT: It doesn't matter whether he paid five cents or five hundred dollars; how deep was it.

Q. Who was employed in sinking the shaft?
A. Mr. Hopkins and J. McLaughlin.
Q. Grant McLaughlin?
A. Grant, yes.
Q. You are as sure of that as you are of anything else you have testified to?
A. Why, I didn't see them do the work.
Q. Do you know how deep the shaft was?
A. As I remember I requested Mr. Smith to measure the shaft.
Q. Then you don't know yourself?
A. No, sir; I didn't measure it.
Q. Was there any mineral in that shaft?
A. Not that I know of.
Q. Were you ever upon that ground prior to the shaft being placed there?
A. Frequently.
Q. Do you know whether or not there was any mineral in that shaft?

A. Do I know whether there was any mineral in what shaft?
Q. In that discovery shaft?
A. I do not.
Q. What is your opinion about it?

Objected to by defendant.

Q. Was there any mineral discovered in that shaft prior
209 to the time of the signing of that lease?

Objected to by defendant as not cross examination.
The COURT: The objection is sustained on the ground that the witness has already stated that he does not know.
To which ruling of the court plaintiffs duly excepted.

Q. Then, Mr. Limberg, your claim to this property at the time you made this lease to Mr. Walsh and Mr. Slavin was purely on the location and filing of your location certificate?
A. It was the locating of a claim on the public domain; yes, sir.
Q. On mineral?
A. I didn't state so. It was complying with the terms of the United States to make a location.
Q. You have stated that there was a cessation of work under this lease some time during the spring?
A. Yes, sir.
Q. How long was that period?
A. I couldn't say.
Q. Was it thirty days?
A. I wouldn't say; it was during the time the snow was melting and water running in the shaft. I don't know how long.
Q. Did it occur along about the melting period, from the 15th of March to the 15th of April?
A. Might have occurred there or in May, I wouldn't state the time. I only know it was in the spring time, that is when we have spring here, during the melting season.
Q. What time did work stop upon that shaft, if you know?
A. I should say in the fall.
Q. What time in the fall?
A. About, say perhaps September or October.
Q. September or October; early in September or at the end?
210 A. I couldn't tell you.
Q. Early in October or at the end?
A. I couldn't tell you.
Q. Do you know how deep the shaft was sunk?
A. Somewhere in the neighborhood of three hundred feet.
Q. Were you ever in the shaft?
A. Yes, sir.
Q. Were you at the bottom of the shaft?
A. No, sir.
Q. How deep were you down?
A. The second level, about 140 feet I guess, or 138.

Q. How long was the shaft worked by a windlass?
A. I don't know.

The COURT: Mr. Elder, the only question is was there a discovery there; Mr. Limberg says that he does not know whether there was ever a discovery in the Pocket Liner shaft.

Mr. ELDER: Let that statement be taken down.

The COURT: Did I not understand you to state that you didn't know whether there was a discovery in that shaft, or was it the discovery shaft?

The WITNESS: Yes, sir, in the discovery shaft.

The COURT: As far as the Pocket Liner shaft goes you can question as to its depth and whether there was a discovery in it; you must confine yourself to the facts not to methods of asking if he knows there was a discovery and how deep it was and all about it.

Mr. ELDER: Mr. Limberg has made the statement that he was up there at different times when Walsh and Slavin were working the shaft——

Mr. CAVENDER: He has not testified to anything of that sort.

211 Mr. ELDER: I ought to be allowed to examine with reference to the details of that.

The COURT: You cannot go into the question of the manner in which it was done; you can go into the question of the time when it was done. The question is what was there and when was it there.

To which ruling of the court plaintiffs duly excepted.

Q. Two other inquiries with reference to the manner in which that shaft was worked: How many shifts were worked in the shaft?
A. I don't know, I couldn't state.

The COURT: That is the same thing; if you can assist the court by confining this examination to the issues I wish you would do it.

Mr. CAVENDER: We thought we could save time by not objecting.

Q. You have stated, Mr. Limberg, that the time they were at work there was from the 30th of January, the date of this lease, until the end of September or the first of October, 1894, with an intermission of thirty days?

Mr. CAVENDER: He has not testified to that; I object to the question.

And the court sustained said objection.

To which ruling of the court plaintiffs duly excepted.

Q. When did they commence work under this lease?
A. Under this lease, I presume they went to work the next morning.
Q. Had they been in possession of these premises before that?
A. So I hear.
Q. Did you hear it from Walsh and Slavin?
A. Yes, sir.

212 Q. How long had they been in possession of the shaft?
A. I can't say.
Q. Was it ten days?

Objected to by defendant.
And the court sustained said objection.
To which ruling of the court plaintiffs duly excepted.

JOHN KING being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. Your name is John King I believe?
A. Yes, sir.
Q. You reside in Leadville?
A. I do, yes sir.
Q. Did you reside in Leadville in 1894?
A. Yes, sir.
Q. I will ask you to state whether or not you were interested in working what is known as the Golden Rod or Pocket Liner shaft?
A. I was, sir.
Q. From what time?
A. From the time it started, beginning on the lease.
Q. Until when?
A. Until it was—we quit work.
Q, About when was that as near as you can state?
A. When we quit work?
Q. Yes.
A. It was some time in November, October or November.
Q. Of 1894?
A. Yes, sir.
Q. Was there any intermission between, I mean did you cease work?
A. Yes, sir; ceased work on account of water.
Q. What time?
A. Some time in May.
213 Q. For how long?
A. Well, I don't just remember how long, three or four weeks probably.
Q. Who were you interested with in working that?
A. Charles Slavin and Thomas Walsh.
Q. Charles Slavin and Thomas Walsh.
A. And Bonner; there was six of us I think in the lease.
Q. I will ask you to look at Exhibit "B" and state whether or not that was the lease under which you were working—copy of it?
A. Yes, sir; this is the lease.
Q. That is the lease?
A. Yes, sir.

Q. What work was done in the shaft from the time you began? Just explain to the jury what was done?

A. We put the shaft down there I don't know how deep it was, I never measured it, and started on some drifting.

Q. Started at drifting?

A. We started our work drifting; yes sir.

Q. Is that what is known as the second level now?

A. Yes, sir.

Q. How far did that drift run—was that drift run?

Objected to by plaintiffs; the defendants have not yet established the fact that this gentleman personally worked in that shaft.

Objection overruled.

A. I was interested in the work; I wasn't doing the work.

Q. State how far it was run?

A. I never measured it.

Q. Have you examined the drift lately?

A. Yes, sir.

Q. Is that drift the same now as it was in 1894 in length?

A. Well, I couldn't say for that, it looks about the same to
214 me. I haven't been in there since 1894. It looks about the same distance that it was.

Q. That drift was started immediately upon the giving of this lease?

A. Yes, sir.

Q. What was done after that; I will ask you to state whether or not that drift was run before you ceased work on account of water?

A. Yes, sir; it was.

Q. What was done after that?

A. Sinking the shaft.

Q. How deep was that sunk?

A. I don't know exactly just how deep it was. They told me it was about three hundred feet.

Q. You had been down the shaft?

A. I have been down the shaft.

Q. I will ask you if you ever took any material out of that drift?

A. Yes, sir.

Q. When did you take it out and from what point in the drift?

Objected to by plaintiffs.

But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

A. Some time in March I took th[illegible]

Q. March of what year?

A. March, 1894.

Q. What did you do with the material?

A. Had it assayed, took it to an assayer.

Q. Who did you take it to?

A. Eugene Stevens.

Q. When was that?

A. That was the fore part of March, I forget just exactly now, some time in March.

Paper produced and marked for identification Exhibit "C."

Q. I will ask you to look at Exhibit "C" and state who gave you that?

A. Who gave me this card?

Q. Yes.

A. Eugene Stevens.

215 COPY DEFENDANTS' EXHIBIT "C."

Office of Eugene Stevens, assayer, 110 East Fourth St.

LEADVILLE, COLO., *Mar.* 10, 1894.

This certifies, that the sample of ore, said to be from the —— lode, assayed for for Mr. King gave the following result per ton:

No.	Marks.	Silver ounces.	Gold ounces.	Lead per ct.	Iron per ct.	Mang. per ct.	Silica per ct.	Copper per ct.	Zinc per ct.
1		7	03-100						
2									
3									
4									
5									
6									
7									

Limberg Golden Rod.

Whipple, printer.
Copy Def'ts' Ex. C.

EUGENE STEVENS, *Assayer.*

216 Q. I will ask you to state whether or not that is the card given to you as the assay of the material taken from this drift?

A. Yes, sir; that is the card, because I went and seen his books.

Q. Whereabouts in the drift was that taken?

A. About six feet from the shaft.

Q. About six feet from the shaft?

A. Yes, sir.

Cross examination of Mr. KING by Mr. ELDER:

Q. Mr. King, do you remember the date work commenced upon the Pocket Liner shaft?

A. I do not, sir.

Q. Were you a partner in a prior lease?

A. Yes, sir; I was a partner from the first start of the lease to the finish of it.

Q. This lease or another lease?

A. Both of those.
Q. There were two leases then?
A. There was this lease.
Q. There was another lease besides?
A. There was another lease at the same time.
Q. On the same ground?
A. No, sir.

Objected to by defendant as immaterial and incompetent.

Q. Were you a partner in a lease of the Golden Eagle Mining Company to Charles Slavin and Thomas Walsh upon the Carlton and Golden Eagle mining claims?

Objected to by defendant. Objection sustained.
To which ruling of the court plaintiffs duly excepted.

Q. Was work commenced under the lease of the Golden Eagle Mining Company upon the Pocket Liner shaft?

Objected to by defendant. Objection sustained.
To which ruling of the court plaintiffs duly excepted.

Q. Will you state if you applied for a lease to Mr. Limberg
217 and Mr. Esty upon the Golden Rod claim?

Objected to by defendant as not cross examination.
Mr. ELDER: Anything relating to the lease?
The COURT: It don't matter whether he applied for a lease or not, he got it.

Q. Who took the lease from Messrs. Limberg and Esty upon the Golden Rod claim?

Objected to by defendant; the lease states for itself, it is the best evidence.
The COURT: Do you refer to this same lease?
Mr. ELDER: I refer to this lease.
The COURT: The objection is sustained.
To which ruling of the court plaintiffs duly excepted.

Q. Is your name mentioned in this lease?

Objected to by defendant; the lease speaks for itself.
Objection sustained.
To which ruling of the court plaintiffs duly excepted.

Q. How many days did you work in the Pocket Liner shaft, Mr. King?
A. I didn't work in the Pocket Liner shaft.
Q. Did you work any personally?
A. No, sir.
Q. You did no work there personally?
A. Well, I did do a little that is I helped to get started there.

Q. You didn't do any work in blasting or handling earth below the collar of the shaft?

A. No, not to amount to anything.

Q. How many times were you down the Pocket Liner shaft of the Golden Rod claim?

A. I don't remember.

Q. Were you down once?

A. Yes, sir.

218 Q. Were you down twice?

A. Yes, sir.

Q. How many visits did you make down that shaft?

A. I don't remember, sir.

Q. You said that on or about the 10th day of March, 1894 at a point six feet from the shaft you took the material that was assayed on that card?

A. Yes, sir.

Q. What was the character of the material?

A. A bunch of mineralized stuff, iron and porphyry.

Q. Did you use a pick to take it out of the wall of the drift?

A. I don't remember whether I used a pick or a candle stick.

Q. Did you use any instrument to take it out of the wall of the drift, or did you find it lying in the bottom of the drift?

A. I took it out of the walls myself. I started to drive a little hole in the side of the wall, I didn't finish it.

Q. What was it, kind of red porphyry?

A. Kind of red porphyry mixed with oxide of iron, kind of stained stuff.

Q. How far was it drove in at the time you took these samples six feet from the shaft?

A. I guess it was in probably fifteen feet. I didn't measure it.

Q. How deep was the shaft at that time?

A. I don't remember.

Q. Had the shaft been sunk any?

A. Not at that time.

Q. You stated in your direct examination that that drift was run as far in as it is now before the water began to run?

A. As near as I can remember; yes, sir.

Q. Are you as sure of that fact as you are of anything you have testified to?

A. Yes, sir.

Q. You are sure there was no work done in that drift when

219 the water began to run?

A. When the water began to run, I don't understand.

Q. You say that drift was run in there before the water began to impede the sinking of the shaft?

A. The drift was run in there before we started to sink the shaft.

Q. The drift was run in there the whole distance it is now?

A. I wouldn't say the whole distance.

Q. You said that.

Mr. CAVENDER: He didn't say that.
Q. You never measured the drift?
A. No, sir.
Q. You don't know its present distance in?
A. No, sir.
Q. About the 10th of March you believe it was in fifteen feet?
A. Yes, sir; to the best of my knowledge.
Q. And you believe the drift was run the full distance before the water commenced to run?
A. I couldn't say if it was in the full distance before the water commenced to run, that is before they started to sink the shaft it was in the full distance.
Q. Do you remember the distance the drift was in at the time of your visit when you took this sample?
A. No, sir.

By Mr. EWING:

Q. This drift is what is called the second level?
A. Yes, sir.
Q. At about what distance from the surface?
A. I think we call it somewhere between 130 and 140 feet; I think that is what I heard them say it was.
Q. That is the same drift that you examined recently?
A. Yes, sir.
Q. Then after that drift was run at least a large portion of
220 the shaft was continued from that point down?
A. Yes, sir.
Q. And that was all done during the year 1894?
A. Yes, sir.

By Mr. ELDER:

Q. You are sure that the shaft was not sunk any from the commencement of the lease until the drift was in fifteen feet?
A. No, sir; it was not.
Q. It was not sunk any?
The COURT: That is what he said, it was not.

By Mr. EWING:

Q. I will ask you how frequently you were up there during this work?
A. I was up there—sometimes I was up there every day or two and sometimes I wouldn't be up there for two or three weeks. Every time I got a chance—I was hauling ore and every time I got a chance I would go up there.

EUGENE STEVENS being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. You are an assayer, are you?
A. Yes, sir.
Q. Were you such in 1894?
A. Yes, sir.
Q. Doing business where?
A. On Fourth street.
Q. In Leadville, Colorado?
A. Yes, sir.
Q. Do you know Mr. King, the gentleman who has just left the stand?
A. Yes, sir.
Q. I will ask you if he brought you any material in the year 1894 on or about the 10th of March for assaying?
A. Yes, sir.
221 Q. I will ask you if you assayed it?
A. I did.
Q. I will ask you if you gave him a card showing what that assay was?
A. Yes, sir.
Q. I will ask you to look at Exhibit "C" and state to the court and jury whether or not that was what you gave him?
A. Yes, sir; that is my writing.
Q. Does that correctly represent the contents of the material which was assayed by you and brought by him to you for assay?
A. Yes, sir; it does.

Exhibit "C" offered in evidence by defendant. Plaintiffs object to the introduction of Exhibit "C" of defendants bearing date March 10th, 1894 purporting to be an assay card, for the reason that it is not established that the material came from the lode, ledge or vein of mineral in rock in place in the discovery shaft of the Golden Rod Lode mining claim.

2. Plaintiffs object to Exhibit "C" for the reason that it is not shown that the material of which this is supposed to be an assay came from a lode, ledge or vein of mineral of rock in place in the limits of the Golden Rod Lode mining claim.

3. For all of the objections made to the original lease and the record of location.

The COURT: The understanding is that you are going to connect this with the lode?

Mr. EWING: Certainly.

The COURT: With the understanding that it is to be con-
222 nected with a lode in rock in place it will be admitted. To which ruling of the court plaintiffs duly excepted.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Q. This had been brought to you, Mr. Stevens, that day or the day before?

A. I couldn't tell whether it was brought the evening before or the morning of that day.

Mr. EWING: This shows a result of 7 ounces in silver and 3/100 in gold.

No cross examination.

MAX BOEHMER being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. Your name is Max Boehmer, I believe?

A. Yes, sir.

Q. What is your business now and for a number of years?

A. Civil and mining engineering for the last 29 years.

Q. Are you familiar with what is known as the Golden Rod, called here the Pocket Liner shaft, on Breece hill?

A. Yes, sir; I have examined it.

Q. I wish you would tell the jury just what that map you have placed on the board is intended to indicate?

Map marked for identification Exhibit "D."

COPY DEF'T'S EX. D. Southeast drift from Pocket Liner shaft.

(Here follows blue print marked page 223.)

222 A. That map represents a plan, that is a bird's eye view of the Pocket Liner shaft at the second level running from that shaft. The top of the map is north, as indicated by the arrow. The shaft and drift, which is the second level, are both colored in yellow with a black ink boundary. The scale of that map is two feet
224 to every inch.

Q. The rectangular portion, the north end of the map, the colored portion represents a birdseye view of the shaft?

A. Cross section of the shaft; the rest of it represents the drift, that little side drift with the hook on the end of it. This is drawn to a scale, its contour according to the compass about as shown in reference to the arrow.

Q. What depth is the drift from the collar of the shaft?

A. The depth of the drift from the collar of the shaft is 138 feet.

The COURT: You mean the drift at the depth of 138 feet from the surface?

A. Yes, sir; from the collar.

Q. I will ask you if you examined that drift recently?

A. I did, examined it on the 21st of last month.

Q. I will ask you to state whether or not you found, uncovered, discovered or disclosed within that drift any vein or veins of mineral or rock in place, or what did you find?

Objected to by plaintiffs because Mr. Boehmer is not a locator of the Golden Rod Lode mining claim and the discovery was not made by Mr. Boehmer.

But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

A. I found several veins or lodes in that drift.

Q. Where? Just go to the map if you will, Mr. Boehmer, and point it out to the jury?

A. About four feet from the south-east edge of the shaft I found a vein crossing the drift about at right angles, running in a
225 direction north 30 degrees east magnetic. The dip of that vein is toward the shaft at an angle of 76 degrees. The vein is two or three inches think, both wall porphyry, the vein consisting of decomposed porphyry, quartz and iron visible to the eye. Going in 19 feet from the edge of the shaft we find coming in from the northerly side another vein which dips to the north-east, and is followed by the drift almost to the end. That vein is about the same size as the first vein described, but dips to the north-east at an angle a little flatter, not quite so steep, 61 degrees. That vein ends against another one which crooses the drift, which is shown as vein number three on this plan. That vein is about the same size as the other, and is much the same material, surrounded by the same country rock all the way through. Going still further to the very end of the drift, which is 46 feet in length from the edge of the shaft, we find a fourth vein which is the best of all of them, that is it is larger and contains more material foreign to the country, quartz

and iron, and is flatter than any of the others. The direction of that vein is north 10 degrees east magnetic, which would be north 24 true, and dips at an angle of 48 degrees.

Q. Angle of the vein?

A. Dip of the vein. Those four veins are found in that drift at the length of 46 feet. They are all what I would denominate veins in rock in place.

Q. What experience have you had in mining, Mr. Boehmer?

A. I have examined mines in this State, I am familiar with most of the camps, the main mines in them, and in other States of the West.

Q. You have been familiar with this camp since 1879?

A. Yes, sir.

Q. You are familiar with Breece hill?

A. Yes, sir.

226 Q. How far is this from other properties in that neighborhood that are known as working mines, any of them?

A. That shaft is probably within a thousand feet of stopes in the vicinity of other mines.

Q. What mines?

A. The Little Vinnie is one of them.

Q. How does the formation compare, this that you find in this shaft and drift, with the formation you find in neighboring working mines there?

A. That drift comes to the same porphyries which are found in the Jonnie and Vinnie and others in that neighborhood.

Q. What would you say with reference to any of those veins or all of them, with reference to whether or not they would be followed by a miner?

A. I think they should be followed by a miner with the expectation of finding ore upon their trend at depth.

Q. Have you seen similar veins followed which went into ore?

A. Yes, sir; I have seen similar veins, I guess a dozen of them on Breece hill as small as that containing the same material go into pay ore, not in great quantity, except in a few cases. There are similar veins with pay ore in the Glengary, May, Banker, Illinois, Baldwin, Quartz, Hunters Last Chance, the Jonny, Diber Gerber, Sunday and others. I have seen all of those myself.

Q. You spoke of the Hunters Last Chance; that is now known as the Margaret, is it not?

A. Yes, sir.

Q. Did you say you found similar veins in that?

A. Yes, sir; in the old shaft.

Q. Did those follow into ore?

A. Well, that I don't know, whether they followed directly into ore or not at that point, except by hearsay.

227 Q. What do you say with reference to the character of the rock in that drift with reference to its being place, or solid?

A. The entire drift is in rock in place, and I brought samples of the drift and the vein.

Q. Can you just exhibit those samples to the jury?

(Samples shown to the jury.)

Q. What is that, Mr. Boehmer?

A. That is porphyry, representing the hanging and foot walls of the whole vein at the breast of the drift. The large piece is the hanging wall showing the cleavage and smooth surface which joins the vein. The other piece shows the foot wall of the same vein at the end of the drift.

The COURT: Which vein is that?

A. That is vein number four at the breast of the level, and this stuff is the vein stuff out of that same vein. That is the vein matter taken from a vein about four inches thick between the rocks that are shown there.

A JURYMAN: I would like to ask if that is what represented the vein there?

A. Yes, sir; this read streak, this represents the vein; the two white rocks come to the east and to the west of that vein?

By Mr. EWING:

Q. Now, Mr. Boehmer, is that vein similar to the others?

A. Yes, sir; only a little better, a little larger.

Q. That is how does the wall rock compare with it?

A. The wall rock is the same in all of them.

Q. What do you say about the wall over here, along this drift?

A. The wall is very plain, showing that there has been motion of this wall and that continued, and those crevices and cracks
228 that are found there are quite great, not mere cleavage planes or coating cracks, but actual fis-ures, veins.

Cross examination of Mr. BOEHMER by Mr. ELDER:

Q. Mr. Boehmer, you found the first vein four feet from the shaft?

A. Yes.

Q. And what is the thickness of that vein?

A. From two to three inches.

Q. What is the dip of the vein?

A. The dip is to the north-west at an angle of 76 degrees.

Q. Does it cross the drift entirely?

A. It does, on both sides and in the roof.

Q. How far has it been followed from the edges of the drift?

A. Not more than a few inches of it, picking into it.

Q. Did you do most of the following?

A. No, sir; a good many others had seemed to do the same thing before me.

Q. Does that correctly represent all the spurs or seams and all the

cracks and gashes in the porphyry connected with the first vein you saw there?

A. No, sir; it only represents the vein, not the gashes, cleavages and cracks.

Q. Are there any seams, gashes or cracks in the rock passing from the south side of that drift, where that vein strikes the south side of that drift, to the northwestward?

A. I didn't notice any prominent ones, but the entire rock, the entire drift is cracks and cleavages throughout.

Q. Then if you had had time you would have found more than four veins in that drift?

A. No, sir; I didn't say anything of the kind.

Q. The entire drift is full of cleavages and cracks of the
229 same character?

A. Like all the rock.

Mr. EWING: Did you answer that the entire drift was full of cracks of the same character?

Q. Is that right?

A. No, sir; I don't mean to say that.

The COURT: Same character as what?

Q. Same character as the veins?

A. No, that is not so; same character as the entire hill, all hills.

Q. The line of the second vein that you have depicted upon there seems to have a course almost identical with the drift?

A. Very nearly.

Q. How did you establish the first point in the line of the drift?

A. You could see the wall very plainly, stringer coming into the drift at the north-east, 19 feet from the edge of the shaft at the point marked.

Q. Did you follow that vein from the point 19 feet from the shaft to the point where it intersects vein number three?

A. Yes, sir; it can be followed in the roof.

Q. Isn't there a point some 32 or 33 feet from that shaft where the roof is solid red stained porphyry?

A. I didn't notice it; but that may be so.

Q. Porphyry identical with this porphyry that you said is the wall, very red, much more stained than this?

A. No, I didn't notice that; something similar to that.

Q. Did you find this vein in the bottom of the drift,—vein number two?

A. No, I didn't look for it there; too much dirt in there.

Q. Did you pick there at all?

A. No, I did not.

Q. Did you pick in the roof the whole distance from the 19
230 foot point to the intersection of vein number three?

A. I did follow it, every inch of it.

Q. And you are ready to swear from your 35 years' experience as

a mining expert examining mines that this continues from the point 19 feet from the shaft to the intersection of vein number three?

A. Yes, sir.

Q. There is no break?

A. No, sir.

Q. There is no cleavage across that drift at right angles to that vein?

A. Yes, sir; there are cleavages at right angles to the vein in the drift.

Q. How many are there between the point 19 feet from the shaft to the point where it intersects vein number three?

A. I can't tell how many there are.

Q. How far are they apart; you say there are more than one, more than two?

A. I can't tell that, I didn't take any note of it, except that there are cleavages.

Q. In what are those cleavages or slips different from vein number one?

A. Vein number one, sir, has got walls and vein matter different from the country rock. It contains vein material softer, differing in consistency from the walls, it contains other matter foreign to the walls, it contains quartz, some iron and gold and silver.

Q. What is the character of the rock on each side of the cleavages that you mention from the point 19 feet from the shaft to the point of intersection with vein number three?

A. It is decomposed porphyry such as the samples shown here.

Q. Is there any difference between the two classes of rock
231 on each side?

A. No, sir.

Q. Same rock?

A. I consider it the same rock.

Q. Is one wall harder than the other wall?

A. No, sir, not noticeably to me.

Q. Is the wall rock of the first vein softer on the west side than on the east side?

A. No, except that the wall is harder than the rest of the rock.

Q. Is there any difference between the wall upon the north side of that drift and the wall upon the south side of the drift, that is supposed to be the wall of the vein running with the course of the drift that you have depicted as number two?

A. I find no difference in the rocks.

Q. You find no difference in the rocks; now there is one vein that runs north-east and south-west, and one that runs almost——

The COURT: Call them by the numbers.

Q. Vein number one runs north-east and south-west?

A. Yes, sir.

Q. Vein number two runs almost east and west?

A. One runs south-east.

Q. South-east and north-west?

A. Yes.

Q. Of course you have projected vein number two to the right of the drift, beyond the line of the drift; the same method of projection or extension would bring this vein that is continuous from here to here into contact with that vein?

A. If continued on; yes, sir.

Q. Well, it is your opinion——

A. Well, it is out of sight there, you can't see it.

Q. What is the size of vein number two?

232 A. From two to three inches, varying in places. That is the average size.

Q. Does it grow wider going to the south-east?

A. No, I think it looks better to the north-west.

Q. It is better at this point here?

A. Yes, sir.

Q. Is it wider or narrower at the center point where the pointer is?

A. It is not quite as wide, nor is the wall as plain as it is to the north-west.

Q. Did you notice in your examination of this drift a space of some three or four feet of very heavily stained red porphyry along the top of that drift?

A. No, sir; I didn't notice that particularly.

Q. Was it more heavily stained than further back in the drift, at the point where the arrow is we will say?

A. No, I didn't notice it.

Q. Was it more heavily stained than at the point of intersection of vein number two and vein number three?

A. I didn't take notice of it.

Q. Where does the first cleavage occur after leaving vein number one in that drift?

A. Fifteen feet beyond vein number one.

Q. Does that cleavage occur before you reach the point where vein number two is visible in the side of the drift?

A. No, sir; I speak of the point where it is first visible.

Q. Well, fifteen feet from this vein does the other vein come in?

A. Yes, sir.

Q. Then there is a cross cleavage in the rock; how large is that cleavage?

A. I didn't notice any particular one there.

Q. Is it half an inch?

A. I didn't notice any.

233 Q. I thought you testified that fifteen feet from this vein there was a cleavage crossing the drift, one of the cleavages?

A. No, sir; I said fifteen feet from the first vein vein number two came into the drift.

The COURT: Define what you mean by cleavage. If as testified to the drift is run the whole way in porphyry, there must be a thousand cleavages. Your use of the word cleavages conveys no meaning unless you define it.

Mr. ELDER: Mr. Boehmer has used the word cleavage to define a slip.

The WITNESS: Not a slip, a crack separating the rocks.

Mr. ELDER: And he testified in my examination here that there were other cleavages crossing this drift between this point and that point.

The COURT: In using the word cleavage do you mean cleavage planes or do you mean veins?

Mr. ELDER: That is for Mr. Boehmer to answer and explain.

The WITNESS: I have explained how vein number one differed from an ordinary cleavage crack.

Mr. EWING: What do you mean by an ordinary cleavage crack?

The WITNESS: Nothing but a separation of the rock, two pieces of rock.

The COURT: When you speak of a crack do you mean the plane of contact between two separate pieces of rock or do you mean an actual crack in the rock?

234 The WITNESS: Well, it is both, an actual crack in the rock separating two pieces of rock.

The COURT: It doesn't follow that those two pieces of rock were ever joined, does it?

A. Yes, sir, I think so; cooling cracks and cracks of pressure or motion.

Q. Then the difference between your estimation of vein number one, vein number two, vein number three and vein number four is only in the distance between the walls of the cleavages?

A. No, sir; there is a well defined wall, hanging and foot, of both of these veins separating the veins from the country rock.

Q. Now what is the widest cleavage point between vein number one and vein number three, that is across the drift, parallel with vein number one we will say?

A. Why, a quarter of an inch I should say.

Q. A quarter of an inch?

A. Yes, sir.

Q. Is that the average size for the planes of cleavage on each side of the drift, both north and south?

A. That would be an average of the width of the cleavage planes.

Q. A quarter of an inch?

A. Something near that.

Q. Were those cleavages distinct from the north and south side of the drift in each case?

A. No, sir; they didn't cross the drift, nor were they continuous for long distances.

Q. Did some of them cross the drift?

A. I didn't notice any.

Q. You have depicted vein number three as having this course?

A. Northerly, yes, sir.

Q. Is it not a fact that that cleavage, vein or whatever you deter-

mine to call it is more towards the arrow head there and
235 more towards this wall and that little opening than it is here?

A. No, sir; I think that is correct. It crosses that little angle. It is out of sight there really.

Q. It is out of sight at this angle?

A. Yes.

Q. Then the workings have cut into the vein upon that point?

A. They have.

Q. Is that wall smooth there, entirely denuded of any mineral matter, say starting here?

A. I don't remember that sufficiently to have an opinion.

Q. Has the gouge and the mineral matter been taken off of that wall?

A. It has in places; the drift is not vertical, the walls about the bottom projects in places.

Q. Isn't this wall that you have projected on the map, isn't that a smooth plane of rock in for the entire heigth?

A. No, sir; for some distance it is.

Q. Now you have depicted vein number four as coming into this vein?

A. They join outside of the drift, they are not visible in the drift.

Q. You wish your testimony to be understood as not connecting vein number four and vein number three at this point at all, only as a projection of the mind?

A. Yes, sir.

Q. Does vein number four appear at all upon the south side of the drift at the point where the arrow is?

A. No, sir; it is shown only at the breast, south-east breast.

Q. Is it not a fact that whatever that may be, slip, or cleavage or vein, that that stands in the shape of an arch or arc of a circle?

A. The rock has been shot in such a manner as to make
236 that appear; yes, sir.

Q. Did you pick upon the face of the rock sufficiently to make it appear whether the showing is a vein running horizontally across the face of the drift, or whether it is the shape of an arch passing over from one end to the other?

A. The vein is not the shape of an arch; that is the appearance given by the way of shooting the rock as against the wall. The vein cuts across the drift in that direction given there at the top, giving a straight line.

Q. Itn't it a fact at the north side of that drift that the cleavage plane or vein or whatever you care to determine it, is lower than it is at the center of this drift?

A. No, sir; the vein is not lower; the way of shooting the rock out makes the vein visible at a lower point.

Q. Then your claim is that this rock has been shot so that to an outsider it looks as though the vein had been pushed up?

A. No, sir; I don't say that. I say that the vein footwall has not entirely been cleaned only in the middle of the drift the footwall of the vein is plain on the sides of the drift, the rock has not been shot away against it.

Q. Did I understand you to state that there is no appearance of a vein in the south-east corner of the drift to vein number three?

A. Yes, that is my recollection of it; yes, sir.

Q. Your recollection is that it does not swing along across the corner of that drift and come to that point?

A. No, it does not.

Q. Now what is the dip of this vein, east or west.

A. The dip is to the north-west.

237 Q. Vein number four dips to the north-west?

A. Vein number four dips to the north-west at an angle of 45 degrees.

Q. Which way does vein number three dip?

A. Northwesterly.

Q. Which way does vein number one dip?

A. Northwesterly also.

Q. Which way does vein number two dip?

A. Northeasterly.

Q. Now which is the largest and best vein in that drift?

A. I would pick number four as the best one.

Q. Why did you pick vein number four as the best vein?

A. Because it has more foreign material, more quartz.

Q. How wide at this point is vein number three between walls?

A. About three inches.

Q. Did you put your foot rule upon it?

A. No, sir; I can guess that with my eye, measure it with my eye about as well.

Q. If somebody else should come on the witness stand and state that they couldn't push a half inch foot rule between those walls what would be your conclusion about it, that they were mistaken?

A. I would want to see the point myself before I would think anyone did.

Q. Then you state that the vein is three inches in size from the bottom of the drift to the top of the drift between the walls?

A. No, I wouldn't state at any particular point how thick it is. I was averaging the vein as two or three inches.

Q. Did you measure it at the bottom of the drift, where it shows first in the bottom of the drift?

A. No, I don't think I did particularly.

Q. At what point did you measure it?

A. I measured it at every point I looked at.

238 Q. You just looked at it with your eye?

A. Yes.

Q. You didn't put a foot rule on there?

A. I don't think I did.

Q. Then the other man who put a foot rule on there might be more correct?

A. I would trust my eye.

Q. And the othe point, how wide is it where it passes out of sight?

A. There at that particular point I would call the whole thing a foot or two wide, the vein.

Q. Then if somebody should state that the red porphyry lies against that wall in close contact it would not be a correct statement of facts?

A. That would be correct in some places.

Q. Then there would be some places on that side of the drift where the red porphyry comes close to the wall?

A. Yes, where the wall is plain, exposed and visible.

Q. Then there is an interruption at this point of that vein?

A. No, sir.

Q. Somewhere from the bottom of the drift to the top there is?

A. No, there is not.

Q. How can we reconcile your statement that the red porphyry does come in contact with the wall——

A. At the hanging wall it dips to the north-west.

Q. Now how much of the footwall have you seen in that vein?

A. It is exposed on the northerly edge in that little side drift.

Q. At this point?

A. Also in the other.

Q. Here?

A. Yes.

Q. Those are two portions of the footwall you have seen of the vein?

A. Yes; also the footwall where it crosses that angle.

Q. Isn't it a fact, or is it a fact that all of the rock has been
239 shot off of that vein, if it is a vein, at the point where I have that pointer?

A. No, it is not.

Q. It can be visibly seen to the north-west of that point?

A. Well, at some points in the drift at a certain height it is not visible; at a lower elevation it is visible.

Q. Did you examine any other portion of the workings of that property?

A. Yes, I did.

Q. What did you find?

A. I found a level 24 feet above this one.

Q. What did you find in that level, sir?

A. I found that level running northerly from the shaft and then turning northeasterly rather.

Q. What did you find in that level with reference to the presence of mineral?

Mr. CAVENDER: Of course this is not cross examination.

The COURT: You will have to make him your own witness.

Mr. ELDER: I want to find if there is any connection between this vein and those in the drift above.

The COURT: If you want to be bound by the evidence you may make him your own witness.

Mr. ELDER: The court declines to allow plaintiffs to ask the witness anything with reference to the other workings of the mine except the east drift?

The COURT: The court sustains the objection made as not proper cross examination.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. Mr. Boehmer, did you follow any part of this vein or
240 the spurs of this vein, if it is a vein, or the cleavages of this vein, if it is a vein, up in under the timbers of the north-east corner of the shaft?

A. I did not.

Q. Did you examine the exposure of any stained matter that is in the corner of the shaft?

A. No, sir; I didn't notice anything in that corner.

Q. You didn't examine it?

A. Not distinctly or definitely; no, sir.

Q. Did you find a vein or cleavage passing across the drift in that direction which would strike the north-east corner of that shaft?

A. I didn't notice anything particular there, no.

Q. Did you notice anything existing between the shaft and vein number one which would be taken as a cleavage, slip or vein of any kind?

A. No, sir; I didn't notice anything worth noting except those four veins that I have represented.

Q. Did you notice anything behind the timbers around the shaft where they were open at all?

A. No, I did not; I didn't pay special attention. You can't see anything through the timbers to do any good.

Mr. ELDER: I would like to make Mr. Boehmer our witness to ask some questions about the upper drift.

The COURT: Very well, Mr. Boehmer, you are now Mr. Elder's witness.

Q. Mr. Boehmer, you spoke of examining the upper drift?

A. I did.

Q. What did you find in that drift?

A. Shall I describe the drift?

241 Q. Describe the drift?

A. I found a drift running northeasterly from the shaft for about 12 feet, then the drift turned more north-easterly, about north 60 degrees east, and run for a distance of 28 feet. That last branch of the drift contained a vein similar to the ones down below. It

runs in the direction north 61 east and has a dip to the north-west of 69 degrees. It is still found at the breast of the drift.

Q. What is the average size of that vein?

A. The average size of that vein is from four to five inches.

Q. What is its maximum width?

A. About five inches I should think.

Q. What is its maximum width at the bottom of the face of the drift?

A. It is the same, about four inches.

Q. What does the material consist of?

A. The vein material?

Q. Yes.

A. The vein material consists of soft gouge matter, clay, iron, quartz and gold and silver.

Q. What is the footwall of that vein?

A. The same porphyry that is found in the lower level and through this drift.

Q. Did you notice the same four inches of vein matter, hard vein matter——

Mr. CAVENDER: I object to any such questions as this of the man's own witness.

Q. State if you know what was the composition of the footwall of that vein?

A. It was porphyry, decomposed.

Q. Was there any quartz present?

A. Not in the wall; no, sir.

Q. Was there some quartz four inches from the vein matter?

A. No, I didn't see it.

242 Q. Didn't see a little white seam of quartz passing——

The COURT: This is your witness; you must not lead him.

Q. At what point in the drift did the vein first appear?

A. Right at the angle, in the turn.

Q. Right at the angle, in the turn; and was there any appearance of a vein before that?

A. No, sir; I didn't see anything in that first 12 feet.

Q. The first 12 feet of the drift?

A. Yes.

Q. Did you see anything in the shaft indicating the presence of ore or vein material?

A. I did not.

Q. Did you examine the south side of the shaft?

A. I did not; it is timbered there I think.

Q. The south side of the shaft at the level?

A. Yes.

Q. Were not the timbers removed for four or five feet?

A. Not at the upper level, but I wouldn't be positive of that.

Q. Did you examine the material at the left hand side of the south east corner of the shaft?

A. I did not.
Q. At this upper level?
A. I did not.
Q. Was there a stull across the timbers at the time you examined it?
A. No, there was not.
Q. You didn't go beyond the edge of the ladder to examine the south side of the shaft?
A. I didn't examine the shaft at any point.
Q. Did you examine the entrance of the upper level or drift, at the top of the drift as you enter it?
A. Yes, I did.
Q. What was the character of the material on the east side of the drift?
A. I noticed nothing but decomposed porphyry.
243 Q. You noticed nothing but decomposed porphyry?
A. Yes.
Q. What was the difference between the upper drift from its entrance from the shaft to the point that you spoke of 12 feet in where the vein comes in, and the lower drift from the point where vein number one is depicted as coming first in, to its junction with vein number three?
A. The lower drift follows the direction of the vein, while the upper level does not follow in there at that point any fissure or crevice.
Q. What if any material difference is there between the vein matter that you speak of in the upper drift and the vein matter in the lower drift?
A. They are very similar.
Q. Is there a distinct hanging wall in the upper drift?
A. Yes, there is.
Q. Is there a distinct footwall?
A. There is.
Q. Is there the presence of quartz?
A. Between the walls, yes.
Q. Is there the presence of iron in the vein at any time?
A. Yes.
Q. Is there the presence of talc at any time in the vein of the upper drift?
A. Clay, yes.
Q. Is there any talc at all present?
A. Well, I wouldn't call it talc, I would call it clay.

By Mr. CAVENDER:

Q. The walls in the upper level are very similar to the walls in the lower level?
A. Yes, sir.
Q. Same characteristics?
A. Yes, sir.

Q. The vein material in the upper level is iron, quartz, clay and gold and silver, etc., and is the same in the lower level?
A. It is.

244 JOHN R. CURLEY being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. Your name?
A. John R. Curley.
Q. Where do you reside?
A. Leadville, Colorado.
Q. What is your business?
A. Mining.
Q. How long have you been engaged in mining, Mr. Curley?
A. Thirty-six years.
Q. How long have you been engaged in mining in Lake county?
A. Eighteen years; twenty-two years since I first started and was absent four years.
Q. Engaged four years in Montana?
A. Yes, sir; and Idaho.
Q. Do you know the shaft called the Golden Rod shaft or Pocket Liner shaft?
A. I visited the shaft represented to me as the Golden Rod shaft.
Q. Where is that?
A. On Breece hill.
Q. On the brow of the hill?
A. Yes, near the brow.
Q. When did you visit it?
A. On the 7th of January, 1900.
Q. Did you examine what is known as the second level from the surface on that property?
A. I did.
Q. Assuming that map there to be a correct representation, or a representation of that drift and a horizontal plane in the shaft from which the drift starts, I wish you would just state fully to the jury what you found there.

Plaintiffs object to the evidence with reference to the discovery of any vein, lode or ledge in that drift or in the shaft of the
245 Pocket Liner for the reasons alleged in the objection to the lease from Charles T. Limberg and Robert B. Esty to Walsh and Slavin.

But the court overruled said objection.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

A. In the shaft at the depth I should say of 135 or 140 feet I found a drift running southeasterly from the shaft, and in the drift,

on examination, I found veins of mineral consisting of iron, crushed porphyry and quartz matter, which I would state would constitute the mineral matter in the vein at a short distance from the shaft, perhaps two or three feet, a small fissure veins crossing at right angles to the drift.

Q. Assuming this to be at that—would it be about that point?

A. Yes.

Q. Describe that particular vein, if you found it to be a vein, to the jury, or whatever it was?

A. Well, it appeared to be a vein cutting through the gray porphyry rock, from probably an inch and a half to two inches and a half wide, filled with vein matter between walls, consisting as I said before, of crystal-ine matter, iron and crushed porphyry, disintegrated porphyry. Further on in the drift I found a vein running longitudinally with the drift; on the left hand or north side was a well defined hanging wall, and running by that wall was a vein consisting of about the same material found in the first vein. And that wall continued on and carried the vein with it until you meet a point in which there is a set-off or jog in the drift, where this vein running on the line of the drift seems to be met with one
246 running at right angles to it, a cross vein. The vein material in that is the same character as those in the other two as near as I can judge. And in the breast of the small cross-cut or set-off from the main drift appears to be another vein, probably larger than the third vein mentioned; the character of the material as vein matter consists of about the same as the other veins.

Q. What are all of those veins in, what is the country rock there?

A. Gray porphyry.

Q. Is it in place?

A. Yes, sir.

Q. You are familiar with Breece hill?

A. I have been familiar with Breece hill since 1878.

Q. I will ask you to state as a miner whether or not you would follow those veins or any or either of them with the expectation of finding ore?

A. I should have no hesitation in doing so.

Q. Pay ore I mean?

Mr. ELDER: Was the word miner or prospector used?

Mr. EWING: I said miner.

The COURT: The question is whether he as a miner would follow the vein with the expectation of finding pay ore.

A. I should have no hesitation as a miner in following those veins and spending time and money with the expectation of finding pay ore in quantities.

Cross examination of Mr. Curley by Mr. ELDER:

Q. Now would you start on all four at once, Mr. Curley, or would you start on one particular vein?

A. I would start on the one that looked the best.

Q. Now what would you start on?

A. Probably try them all.

247 Q. Would you run an upraise on this vein or would you sink a winze on it?

A. Most likely sink.

Q. And why would you sink when the shaft is 150 feet deeper?

A. I don't know whether it is 150 feet deeper or not.

Q. At what point on vein number two would you commence to search for pay ore in gray porphyry?

A. At the junction where it strikes number three.

Q. On an upraise?

A. Might, or might sink down. It would depend on conditions.

Q. At the top of the drift from this point to here, that is the only place it is disclosed in the drift?

A. Both top and bottom of the drift.

Q. Did you disclose this at the bottom of the drift?

A. I followed it with a pick.

Q. You found a distinct wall running from this point to that point on the north side of that vein and a distinct wall on the south side running from this point to that point of the vein in the drift?

A. Very plain.

Q. Now did you find anything in character and shape similar to a cleavage or slip between the point of junction of vein number two and vein number three and the point where vein number two is first disclosed in the drift?

A. Fractures in the rock.

Q. How large fractures in the rock?

A. Varying from 1/16 of an inch to a quarter of an inch.

Q. Do they seem to become as large as some of these veins depicted on this map?

A. I haven't seen any as large.

Q. You haven't seen any as large, but if they were a few

248 degrees larger in measurement perhaps they would be the same as the others, would they?

A. No, I don't think so.

Q. The fractures are not the same?

A. The fractures were irregular.

Q. One-sixteenth of an inch is the minimum and a quarter of an inch is the maximum; what does it contain?

A. It may contain iron stain.

Q. Is there any difference in the material of the cleavages and this vein except the quantity of it?

A. Yes, sir.

Q. What is the difference?

A. Why, it has continuity and is a vein carrying vein material, vein matter, what we call vein matrix, while the others are simply joinders of the rock filled with a deposition I presume carried by water action and discolored.

Q. Therefore the cleavages are filled with deposition from water action; when the veins have no contents they are a deposition by water action?

A. I wouldn't say that.

Q. How many of those cleavages are there between the junction of vein number three and vein number two and the point where vein number two enters the drift?

A. I didn't count them.

Q. Well, are there two?

A. Yes, I presume so.

Q. Are there three?

A. Probably so.

Q. There may be four?

A. May be.

Q. Do they pass entirely from the south side of the drift to the north side of the drift?

A. They pass in every given direction as fractures usually do in rock.

Q. Then if it became necessary to depict a larger number of veins than four upon that map they could have been depicted there
249 between the junction of vein number two and vein number three and the point where vein number two comes into the drift?

A. I don't understand.

Q. If the defendants in this action had found it necessary to have five veins, and in all the cleavages two of those on the north and south side contained iron matter could they have been depicted as veins also?

A. I cannot answer.

Q. What would an expert with 22 years' experience, called to swear as to what a drift of that kind contained, conclude?

The COURT: What difference does that make?

Q. Mr. Curley, did you discover any spur or any cleavage or fracture or vein—any vein passing from the south side of vein number one in the lower drift towards the north-east corner of the Pocket Liner shaft?

A. I did not.

Q. Did you see anything of vein matter, material, stained matter under the timbers in the corner?

A. I didn't examine under the timbers.

Q. You didn't look there?

The COURT: He has answered that.

Q. Did you see anything passing at all from this corner there in a northeasterly direction, or northwesterly direction from that point in the shape of a mineral vein or a seam?

A. No, sir.

Q. Now will you state if vein number four appears in a horizontal position in the face of that drift?

A. No, not in a horizontal position, it is on a dip.

Q. It has a dip, and what is the vertical distance between the point where that appears on the south side of that drift and
250 the point where it appears on the north side?

A. About three feet.

Q. Three feet?

A. I suppose.

Q. That is three feet below the top of the drift?

A. No, I mean the exposure, three feet of the vein itself.

Q. You don't understand the question; what is the vertical difference between the point where it appears in the drift and where it passes out of the face of the drift, the point where it passes out of the little cut on the side of the drift?

A. Vertical dip?

Q. Vertical height from the top there to the top there?

A. I should say about three feet.

Q. How high up in the drift is the first appearance of this vein?

A. I should judge about a foot from the bottom.

Q. This is a foot from the bottom?

A. Yes.

Q. Then that would be three feet higher?

A. About three feet higher.

Q. Now, does this vein—is that vein exposed at all upon the south side of the drift at the point where the arrow is?

A. Where your pointer is?

Q. Yes?

A. No, sir.

Q. It doesn't come around in the shape of a circle or arc?

A. Not the vein itself, the ground does, the vein comes up in a half circle.

Q. To a non-expert the face of the drift and the vein in the face of the drift looks like an arc, does it?

A. No, sir; the ground looks like an arc, the vein does not.

Q. It is the top of the vein that constitutes an arc?

A. I didn't say there was an arc at all.

251 Q. You have said there was a difference between the height here and the height there?

A. Yes.

Q. It certainly is not in that shape, is it, as that pointer is held, the north side of the drift and the south side?

A. I don't understand what you are trying to get at.

Q. I asked you a few moments ago—you testified that there is a showing of a vein on the north side of the drift three feet lower than the point at the face of the drift, east face of that drift; I want to know if that seems to come up in the shape of a circle or whether it comes as a straight line and the top of it is exposed there?

A. The vein carries its regular course up past the arc of rock.
Q. From this point it goes up, does it?
A. Yes.
Q. Then this is not the lowest point?
A. I don't know what you mean by this.
Q. I mean the point depicted where the arrow shows the dip of the vein is 48 degrees. Say that arrow lay off there, it would have been where that arrow is where the vein is disclosed in the drift; is that higher than that point?

The COURT: That makes an unintelligible record without designating points.

Q. Now, Mr. Curley, you stated that you would follow any one of those veins in search of ore, that you would be justified by the appearance there in considering them a feeder to a vein or ore body. Now will you state which direction you would commence to mine from that shaft to catch any of those veins?
A. I might not mine from the shaft at all.
252 Q. Which one of the veins would you select as the proper point to find an ore body?
A. I would select the junction of veins two and three.
Q. Vein three is not the largest vein in the drift?
A. It don't make any difference; there are two veins meeting, and at the junction I would look for the largest body of ore.
Q. Did you find any evidence of any of these veins depicted upon the map in any other portion of the workings of this property?
A. No sir; I examined no other portion except that.
Q. Your attention was not called to any other portion of the mine?
A. No, sir.
Q. Did you measure the depth of the shaft?
A. No, I didn't; I estimated it.

Court here took a recess until two o'clock.

S. W. MUDD being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. Your name, Mr. Mudd?
A. Seeley W. Mudd.
Q. What is your business?
A. Mining.
Q. How long have you been engaged in mining, Mr. Mudd?
A. For seventeen years with the exception of two years when I was connected with the smelter.
Q. Are you acquainted upon Breece hill in this county?
A. Yes, sir.
Q. Of what properties if any are you manager?

253 A. I am manager of the Ibex Mining Company.

Q. Do you know what is called the Golden Rod shaft?

A. Yes, sir.

Q. Where is it with relation to the properties of the Ibex Company?

A. Westerly from the property of the Ibex, perhaps a thousand feet from No. 4 shaft.

Q. How near approximately to any workings of the Ibex?

A. Approximately a thousand feet; I never made any attempt to measure.

Q. Have you made an examination of the shaft of the Golden Rod?

A. Yes, sir.

Q. What is the formation of the hill, how does it compare with the formation on the Ibex properties?

A. It is porphyry in the Golden Rod shaft, the same kind of porphyry as is found in the vicinity of the Ibex workings.

Q. I wish you would state to the jury, assuming that the map is a correct map of what is known as number two drift from the Golden Rod shaft, state fully what you found there.

Plaintiffs object for the same reasons contained in the objection to the original lease of Charles T. Limberg and Robert B. Esty to Thomas Walsh and Charles Slavin. But the court overruled said objection.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

A. I went down the shaft approximately 140 feet and there found a drift going off southeasterly direction. About four feet from the shaft there was a vein crossing the drift at right angles and dipping to the southwest. This vein was clearly defined, having
254 walls, and having distinct mineral matter different from the walls of the vein. It dipped to the north-west. Further along in the drift a vein was found well on the north side of the drift, as shown in the sketch, and followed along the drift pretty near to the face. The vein was shown in the roof and the wall was shown along the side of the drift. That vein also had distinct walls, clearly marked and well defined vein. Further ahead is another vein here of the same general character as the others, perhaps a little larger at this end than the others. In the face was the largest vein of all with a dip about as shown on the sketch here, this one being flatter and somewhat larger. In addition to those there was a small one running across some distance back, perhaps some 15 or 16 feet from the shaft, much smaller than the others, but much the same character, however.

Q. How large?

A. The maximum would be I should think from a quarter to half an inch in width. At this point there was apparently rather more mineralization, near the intersection of the vein this vein shows

more mineral matter than the others, the dip being somewhat flatter. It showed around in the face here, it being somewhat higher at the other points across the plane of the vein intersecting the face accounted for that vein. This was a plain, well defined lode or crevice in so far as I could see.

Q. Coming back to vein number one next to the shaft, I will ask you to state whether or not that was such a vein or fissure as a miner would follow with the reasonable expectation of finding ore?

A. It was.

Q. Of pay ore?

A. It was.

255 Q. How does it compare with the veins in the vicinity in a similar formation?

A. I have seen veins in the vicinity in similar formations that were not in places so clearly defined as that vein, that is that were followed along the strike and in depth opened out and yielded much valuable ore, opened out to various widths and in many places proved exceedingly valuable and pinching up again and becoming no larger than that and less clearly defined in places than that vein, and such veins have been followed hundreds of feet and have yielded much ore and are yielding much ore now.

Q. Altogether within porphyry?

A. Altogether within porphyry in places. The veins generally, however, are not limited by the porphyry, and such veins are seen passing out of the porphyry into the drift, you find them in connection with quartzite.

Q. What would you say as to the question with reference to the other veins you find in there?

A. The other veins, these other three veins are about as well defined as this, and this last one is rather better, larger, and all of them would warrant a miner in following them.

Q. I would ask you to state whether or not in your judgment each of them or any of them are veins of mineral in rock in place?

A. All of them I consider so.

Mr. ELDER: Are you speaking of the four on the map?

A. I am speaking of the four on the map; the other one is of the same general character as those.

By Mr. EWING:

Q. Much smaller?

A. Smaller and less clearly defined.

Q. When did you make this examination?

A. On the first of this month.

256 Cross-examination of Mr. MUDD by Mr. ELDER:

Q. Mr. Mudd, is there anything leading off from the south side of vein number one at or near the bottom of the drift in either direction?

A. I saw nothing of the sort.

Q. Did you observe anything crossing the drift on the south side of the drift near this corner of the shaft?

A. Nothing that I thought worthy of note.

Q. Was it any larger than what you have designated a vein across here; you have designated something not pointed out on the map as a vein?

A. Yes.

Q. Say what you saw from that point?

A. I say that there was not—if there was anything I noticed at all it was so small that I made no note of it.

Q. Was it larger or smaller than this one?

Objected to by defendant.

The COURT: The witness has said he doesn't remember it at all.

Q. Mr. Mudd, you heard Mr. Boehmer call the occurrences between this vein and this number three vein—between vein number one and vein number three, the parallel appearances across the drift, as cleavages?

A. Yes, sir.

Q. Now you said that you believed that this was also a vein instead of a cleavage?

A. I believe there is one small place that might be considered a vein; it is so small it might be overlooked. I have learned to notice these things carefully recently on that hill.

Q. Was that the only appearance of a vein between vein number one and vein number three?

257 A. The only one I noticed.

Q. That you call a vein?

A. Yes, sir.

Q. Was there a cleavage of any kind outside of that?

A. The rock is all full of cleavages, rock cleavage.

Q. And the only difference between this vein that Mr. Boehmer designated a cleavage and those is in the size?

A. I didn't know that Mr. Boehmer designated that at all.

Q. You heard him mention the fact that there were a number of cleavages across here, quite a number from this point to that point?

A. Yes, sir.

Q. What do you think the word cleavage to mean?

A. In connection with that I would mean a smaller crack or little opening in the rock and are not filled with vein matter, have no great continuity as to length, are not so regular, have no well defined walls and are not filled with matter differing essentially from the rock itself, when they are filled at all.

Q. Can you account for this cleavage at almost right angles to vein number one and vein number three?

A. You can.

Q. How can you call the general course of the veins going northeast and south-west then, with a very distinct vein running nearly

perpendicular almost to the course of the other three or four veins that you have designated?

Objected to by defendants because it presumes as a premises that Mr. Mudd has stated the general course of the veins to the north-east and south-west; no such statement was made.

The COURT: He may answer the question and correct that
258 if he chooses.

Q. Is it a fact, Mr. Mudd, that the general course of the veins and cleavages upon Breece hill have a general course north-east and south-west?

A. Well, as far as the cleavages are concerned they have no general course; as far as the main veins are concerned I would not say so. The main ones do not run in that direction.

Q. The main veins do not run a north-east and south-west course?

A. The largest veins that I have seen do not. There are a number of productive ones running to the north-east, but the largest ones do not have that course.

Q. How long have you been connected with the Ibex Mining Company's property?

A. I took charge of the Ibex Mining Company's property in May last.

Q. Is there any difference between the class of porphyry to the east and to the west from what is known as the Weston fault?

A. I cannot say as to that.

Q. Is the same porphyry found west of the Weston fault as is found to the east?

A. I can't say.

Q. Have you seen veins of this character within as shallow a distance of the surface as those are, 140 feet?

A. Yes, sir; very close to that.

Q. At what points?

A. Several points within the workings of the Ibex.

Q. Have you found them in upraising or sinking shafts?

A. In drifting more especially.

Q. Where does that occur?

A. Near the surface in the third level north of number two shaft, and some five or six hundred feet north of the shaft on the
259 first level, and south of number two shaft.

The COURT: Does this evidence apply to this case?

Mr. ELDER: I just wish for such veins as have been found at such a shallow depth.

The COURT: He has testified that they have.

Q. Mr. Mudd, what is the size of vein number one?

A. From half an inch to an inch and a half, possibly a little larger.

Q. Did you measure that?

A. No, sir; I did not.

Q. What is the average width of that vein?
A. An inch to an inch and a half.
Q. Well, the average of it?
The COURT: That is an exact answer to your question.
Q. Well, what is the minimum size of the vein?
A. I doubt whether it is as small as half an inch in any place; I didn't measure it.
Q. The maximum is an inch and a half?
A. No, sir; the maximum is greater.
Q. On which side of the drift is it larger?
A. I can't say.
Q. Is it as strong upon the north side as it is upon the south side?
A. I remember no distinction upon the two sides.
Q. How far is vein number one from the first appearance of vein number two?
A. I didn't measure that distance, perhaps ten or fifteen feet.
Q. Where is vein number two disclosed first, is it in the side of the drift?
A. I didn't measure the distance.
Q. You can't state whether you saw that in the top of the drift or at the side of the drift?
260 A. The first I observed was the walls showing on the left hand side of the drift.
Q. Was there anything lying upon the wall?
A. The wall was clean.
Q. It was denuded of all mineral matter?
A. Mineral matter in the roof.
Q. Well, so it was also clear to the bottom of the drift on the left hand side going east?
A. The vein shows where it passes out of the drift on the left hand side.
Q. And is entirely visible in the roof of the drift from the point where it departs from the north side line to the point of junction with vein number three?
A. I saw no interruptions.
Q. Did you see at any point between the point where it departs from the side of the drift to the point of junction, did you see a mass of red porphyry covering the entire roof?
A. I don't remember that, sir.
Q. Some very red porphyry specially distinguishable in that drift?
A. I didn't notice it; no, sir.
Q. Now we come to vein number three—before I pass to that, what is the size of this vein, the average size?
A. That would be approximately the same as the other, an inch to an inch and a half. Some points would be less than an inch, perhaps.
Q. And that was continuous for the whole distance?

A. Down to that vein, yes, sir; vein number three.

Q. State the dip of vein number two, what was the dip of it, the dip mentioned on the map, 61 degrees to the north-east?

A. I have it 60 degrees to the north-east?

Q. And referring to vein number one, what do your notes
261 show the dip of vein number one?

A. The dip is 75 degrees.

Q. To the west?

A. To the west, yes, sir; to the north-west.

Q. What is the size of vein number three?

A. Number three would be—well, it would average about the same as the others, except the extreme north end, there it was a little thicker, as I remember it; it would be an inch to an inch and a half, some parts being less than that.

Q. Do you state, Mr. Mudd, at any point from the bottom of the drift to the top of the drift that the width between the walls is an inch?

A. That is my impression; yes, sir.

Q. Did you put a rule upon it?

A. Yes, sir.

Q. What was its appearance at the time you saw it, had it been picked into?

A. Yes, it had been picked into on each side.

Q. Do you think the picking process had resulted in digging the sides of the wall?

A. I should think not; no sir.

Q. What was there in the filling between the walls?

A. There was clay, iron stained matter and iron, quartz and decomposed poryhyry.

Q. Is that a correct portraiture of the course of that vein across the drift?

A. I have that shown as the course north 56 east, true; I think those courses are given magnetic.

Q. Would the course you make it bring it closer to the arrow head here?

A. The course is not given there at all I think; it would be essentially the same as that, possibly a degree different.

Q. This vein passes through the corner of that drift at the arrow head there?

A. I don't remember about that.

Q. Is it all entirely denuded at that point?

262 A. It is smooth; yes, sir.

Q. Now do you remember anything about the point of contact where the vein strikes the side of that—wall of that drift?

A. Except that my impression is that it is a little larger and better than it is on the other side.

Q. Is there any place from the bottom of the drift to the top of the drift at which the porphyry is in close contact with the wall?

A. The porphyry is the wall.

Q. Is there any point where the vein seems to be pinched up and the porphyry has crowded it out from the wall, is there any point where the vein does not appear from the bottom of that drift to the top of the drift?

A. The vein is continuous.

Q. Continuous from the bottom of the drift to the top of the drift?

A. Yes; it can be followed around that place, yes.

Q. You mean around here?

A. No.

Q. Around that place?

A. Yes.

Q. How wide is it, say at the point where it strikes that drift, two feet above the bottom of the drift?

A. I don't remember specially about that point, but as I said my impression is it is rather larger than it is here.

Q. Rather more apparent on that side than at this side?

A. That is my impression.

Q. Now we come to vein number four; what is the size of vein number four?

A. That would be from one to three inches.

Q. Do you believe that is a correct portraiture of the position of those two veins at the north side of that opening?

A. They are approaching each other.

263 Q. Have they touched one another?

A. I am not sure of that; my impression is they have not met in that drift.

Q. Now has this end of that vein met this one at any point between the two?

A. It is not shown in the drift.

Q. How far does that approach here, does it swing in that direction at all?

A. The vein doesn't swing, no; the fact that the vein is flatter than the other, being at an angle of 45 degrees instead of being almost vertical makes the intersection with the face of the drift a peculiar shape.

Q. Do you believe the filling of these seams, cracks or veins or cleavages, whatever you may call them, are sufficiently defined under the mineral laws of the United States?

A. Yes, I do.

The COURT: Don't answer that question.

Q. Have you ever located mining claims, Mr. Mudd?

A. Yes, sir.

Q. Have you located them on veins of that size?

A. Yes, I have, located them on poorer showing than that.

Q. You passed by a drift some 23 feet above this level; do any of these four veins—you demonstrated an extra one that Mr. Boehmer seems to have overlooked,—do any of these four veins or the vein

that seems to be running at right angles to them appear in the course of that drift, or did you examine the drift?

A. I was in the drift, went into the face of it. I didn't examine it closely for those veins cross-cutting it; specially I didn't examine 12 or 15 feet from the shaft where number two vein would naturally cross it if projected.

Mr. CAVENDER: That is not cross examination at all. He must make him his own witness if he goes on at all.

264 The COURT: He may make him his own witness.

Mr. ELDER: They have testified to the condition here, that if it is a vein at all they have it there now for 30 feet, and if it is a vein at all it should have been very clearly disclosed in the drift Mr. Mudd went through.

The COURT: That is entirely a matter of inference; it may be a blind vein, may stop between that level and the next one.

Mr. ELDER: Certainly the plaintiffs have a right to ask Mr. Mudd if he saw it.

The COURT: He said he made no examination.

Q. Is that correct?

A. I didn't notice the first twelve feet with any special—I saw no vein in the first twelve feet—ten or twelve feet.

Q. Have you any interest in the Ferrum Mining Company?

A. None as it now stands, I may have.

Q. You had none in the original location or the subsequent conveyance to the Ferrum Mining Company?

A. My name has never appeared; if there is any interest it is through Mr. Estey. I have never discussed the matter, I don't know just what the situation is.

265 W. F. MCDONALD being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. How long have you resided in Leadville, Mr. McDonald?

A. Twenty-one years.

Q. What is your business?

A. Mining.

Q. Do you know what is called the Golden Rod or old Pocket Liner shaft on Breece hill?

A. Yes, sir.

Q. Have you ever made an examination of that shaft?

A. Yes, sir.

Q. And the workings from it?

A. Yes, sir.

Q. How recently?

A. On the 21st of January.

Q. I wish you would take the pointer, Mr. McDonald, and go to the map and state to the jury just what you found?

Objected to by plaintiffs for the same reasons as set forth in the objection to the lease and the evidence of Mr. Mudd.

But the court overruled said objection.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Q. Proceed, Mr. McDonald.

A. At a point 138 feet down the shaft there is a drift to the southeast 46 feet long. At a point four feet from the side of the shaft is a vein cutting across at nearly right angles, from one to two inches thick, apparently in material carrying gold and silver; and at a point 19 feet from the shaft and running from there to 41 feet from the shaft, was vein number two about the same size.

Q. Is there any wall showing there?

266 A. Yes, sir; shows a very smooth nice wall. And at 41 feet from the shaft is another cross vein crossing nearly at right angles about the same size as number one and number two. Across the breast of the drift and of this little side drift was vein number four, a larger vein.

Q. Well, have you had any experience in mining in this camp?

A. Yes, sir.

Q. During what period?

A. Well, during the last 21 years.

Q. Are you familiar with the formation of Breece hill?

A. Yes, sir.

Q. I will ask you what formation that drift is run in?

A. In porphyry except porphyry in crossing these veins.

Q. I will ask you to state if—taking vein number one—if that is such a vein as a miner would follow with the reasonable expectation of finding pay ore?

A. Yes, sir.

Q. What with reference to the other vein?

A. The same with reference to all the veins.

Q. Is number one and the others in rock in place?

A. Yes, sir.

Q. How deep from the surface is the porphyry there?

A. Where the porphyry commences?

Q. Yes?

A. There is very little wash there, I don't know just what the depth is at that place.

Q. How does the formation in that shaft compare with the formations elsewhere on Breece hill?

A. It is the same.

Q. I believe you stated the depth, did you measure the depth from the surface to the drift?

A. Yes, sir; it is 138 feet.

Q. I will ask you if you took any samples from that working?

A. Yes, sir.

267 Q. To whom did you give them?

A. Mr. Eugene Stevens.
Q. Did he return any card to you?
A. Yes, sir.
Q. Have you got that?
A. Yes, sir.
Q. I will ask you to state where the one marked No. 1 came from?
A. No. 1 is quartz from vein number four.
Q. Just indicate to the jury where you took that?
A. No. 1 was taken from this vein; it was a general sample of quartz in this entire distance across there.
Q. Where was No. 2 taken from?
A. No. 2 was taken from the same vein, softer material across the entire face.
Q. Where was No. 3 taken?
A. No. 3 was from this number three vein.
Q. Where was No. 4?
A. No. 4 from number two vein.
Q. No. 5?
A. No. 5 from this number one vein.
Q. Is that all you took from that portion?
A. Yes, sir.
Q. You delivered those to Mr. Stevens?
A. Yes.
Q. This card marked Exhibit "E" was received from whom?
A. Mr. Stevens.
Q. Purporting to those——
A. To show the value of the ore.
Q. That you delivered to him?
A. Yes, sir.

Cross-examination of Mr. McDONALD by Mr. ELDER:

Q. Did you see any other appearance in that drift between vein number one and vein number three?
A. There is a good deal of porphyry.
Q. Was there any slips or seams?
A. Good many seams, yes, sir.
Q. Do they advance clear across the drift?
A. Some of them might.

Q. Did you see the one Mr. Mudd designated as the fifth
268 vein in that drift?

A. If I did it was so small I didn't notice it.
Q. Well, you made a very particular examination, did you not?
A. Yes, sir; I examined the whole of it.
Q. Now, did you see at any point between vein number one and vein number three in this drift a body of very red porphyry at the top of that drift?
A. I don't remember that.
Q. You don't remember that as existing in the drift at all?

A. I don't remember it; no, sir.

Q. You do remember though looking at this point say about half way along the length of vein number two?

A. I looked along that wall the entire distance.

Q. This vein was continuous?

A. Yes, sir.

Q. Continuous along the top of the drift?

A. Yes, sir.

Q. What was its width, size?

A. From one to two inches thick.

Q. Now what became of the two walls of this vein when it passed beyond vein number three?

A. Does not show beyond that point.

Q. Does not show beyond that point at all?

A. No, sir; there is a fault in vein number three, which has probably moved out to one side.

Q. There is no evidence of it on either side, on the east side, of vein number three at all?

A. No, sir.

Q. What is the size of vein number two?

A. From one to two inches.

Q. What is the size of vein number three?

A. About the same.

Q. What is the size of vein number three on the south side of the drift?

A. One to two inches.

Q. One to two inches; did you measure vein number three at the south side with any rule?

A. No, sir; I did not.

269 Q. Used your eye?

A. Yes, sir; I could tell very closely that way.

Q. How far had that vein number three been picked into with little prospectors' picks?

A. Only a few inches.

Q. But it had been picked into clear from the bottom of the drift to the top of the drift, had it not?

A. I think it had; I know it had in some places.

Q. What was the date of your examination?

A. 21st of January.

Q. At the point vein number three is projected at the north side of that little off-set in the drift does it at any point peter out against the porphyry?

A. No, sir; not as far as the workings go.

Q. It is distinctly visible from the bottom of the drift to the top of the drift?

A. Yes, sir.

Q. At no place has been cut out by red porphyry?

A. No, sir.

Q. Will you state if vein number three and vein number four encounter one another in the north side of that small cut?

A. No, sir.

Q. What is the space between the two veins there?

A. They come rather close together there, I couldn't say just how far apart.

Q. But you can swear that they have not struck one another before passing down to the side of the drift?

A. No, sir; they have not.

Q. What is the size of vein number four?

A. About four inches thick.

Q. You said that sample marked 1 Golden Rod came from vein number four?

A. Yes, sir.

Q. Quartz vein, and was a fair sample clear across the vein?

270 A. The entire length of it as far as exposed.

Q. And sample No. 2 came from vein number three?

A. No, sir; it came from vein number four.

Q. What was that picked specimen or sample of the vein?

A. Sample of the softer mineral in the vein.

Q. Now did you take any porphyry on either side of the vein to make an assay?

A. Not to make an assay; no, sir. We took some of it, those two pieces there.

Q. Have you had any of the porphyry walls of that vein assayed at all?

A. No, sir; never did.

Q. Have you ever had any of the porphyry of Breece hill in that vicinity assayed?

A. No, sir.

Q. Never have had occasion to determine the gold and silver contents of the porphyry of Breece hill?

A. No, sir; never did.

Q. Have you had occasion to ascertain the gold and silver contents of any other porphyries in the camp?

Objected to by defendant as immaterial.

And the court sustained said objection.

To which ruling of the court plaintiffs duly excepted.

Q. Sample number three came from vein number three; at what point in the vein did you take that?

A. Along the entire length as far as exposed.

Q. You took from the bottom of the drift to the top of the drift on the south side?

A. On the sides and roof.

Q. Clear across the drift at the bottom?

A. No, sir; at the bottom there it was partly covered up.

Q. Then you took along the top of the roof?

A. On the roof and sides.

271 Q. To the bottom on that side of the drift, then you followed it over across that point and took samples in there?

A. All along wherever the vein is exposed we took part of the sample.

Q. To make your sample of that vein did you take any part of the wall rock?

A. No, sir.

Q. Did you pick into it, into the vein with your pick?

A. Yes, sir; in order to get the sample.

Q. How deep into the vein do you suppose your pick had gone?

A. Oh, a couple of inches perhaps.

Q. It had been picked very tightly on that side?

A. We took a sample along there.

Q. It was a little difficult to get anything out, was it not?

A. There was no difficulty in getting plenty for a sample.

Q. How large a sample was that?

A. Well, we took these ordinary canvas sample sacks, probably would be between one and two pounds.

Q. Now in what manner did you sample vein number two?

A. Same way as the others.

Q. And that followed along the top of the drift?

A. Yes, sir.

Q. You didn't take any samples from the bottom of the drift?

A. One place picked into the bottom some and on the side where it first enters the drift.

Q. You were enabled to get a sample of the vein inside of the porphyry, along side of it?

A. Took a sample of the vein in each case; yes, sir.

Q. Now, Mr. McDonald, you are willing to swear that there is a continuous vein from 19 feet from that shaft to the point marked there, the intersection with vein number three?

A. Yes, sir.

272 Defendant objects to the form of the question.
Objection sustained.

Q. You state there is a continuous vein from this point——

The COURT: He has answered it yes.

Q. Sample No. 5, is from vein number one; what point in that vein did you take the sample?

A. On the sides and roof.

Q. Did you take any sample from the bottom at all?

A. I don't think I did; no, sir.

Q. Do you think any of the red porphyry that is in that sample came out of the side of the drift, is there a hole there?

A. I should think on the side, it is cut in a little bit over there.

Q. What seems to be the majority of the material?

A. On the sides of the vein?

Q. On the sides of the vein.

A. Porphyry.

Q. Any distinction between the two sides of the vein at all?

A. No, sir; same kind of porphyry.

Q. Which way do these veins dip, starting with vein number one?

A. Vein number one dips to the northwest, number two to the northeast, number three, well, it would be a little west of north, northwesterly. They stand nearly vertical. Vein number four dips to the northwest. It is a great deal nearer flat, an angle of 48 degrees.

Q. Will you state, Mr. McDonald, if you saw any signs of a drift you passed 23 feet above this level?

Objected to by defendant as immaterial.

The COURT: You must make him your own witness.

273 Q. I will ask Mr. McDonald if he stopped in that drift?

Objected to as immaterial and not cross examination.

The COURT: Are you making him your witness?

Mr. ELDER: I am not making him my witness.

The COURT: Then you cannot examine as to that.

Q. I will ask another question; is that vein as projected, Mr. McDonald, on this map, the general course of the vein seems to be a little northwest course, I mean of the vein; in its course would it pass through and into the shaft?

A. I couldn't say about that; I can only testify as far as I can see it.

Q. Did you see any evidence of this vein under the timbers at the corner of the shaft?

A. No, sir; the shaft is timbered; I didn't look for it.

Q. Did you see anything in the nature of a seam, crevice or fissure, or a cleavage perhaps, or even a little vein passing from this point in the south side of the drift at vein number one to and under the corner of that shaft?

A. I didn't see any vein; no, sir.

Q. What did you see?

A. I don't rember seeing anything.

Q. Did you see some red porphyry that is on each side of that, if there is any there at all, right at that point?

A. There is porphyry on both sides of all the veins.

Q. I will ask you if from the edge of the shaft to the face of the drift if there is much distinction between the porphyry?

A. It is all the same kind.

Q. There is no place where it is more heavily stained with iron than any other?

A. Just as much as this always is there.

Q. At what point does it seem to be more heavily stained,
274 where that arrow is?

A. I couldn't say about that at all.

Q. At what points did you see more heavily stained porphyry than others?

A. I can't designate the points.

Q. Are there points where the porphyry is ordinary white bird's-eye porphyry?

A. Some points greater than others.

Q. What space from the shaft to where the vein is, four feet, is occupied by white porphyry?

Objected to by defendant.

The COURT: Let him answer the question.

A. It was porphyry from the shaft to vein number one.

Q. From vein number one to vein number three was all porphyry?

A. Yes, sir; except where vein number two came in.

Q. Except where vein number two came in; now these cleavages in the rock, how many do you think there was between vein number one and vein number three?

A. I don't know; you always find these little cracks in porphyry, you can't count them, they run in all directions.

Q. Mr. McDonald, have you any interest in the case now being tried?

A. No, sir.

Q. None whatever?

A. No, sir.

Q. Have you ever made any locations of mining claims upon Breece hill?

A. Yes, sir; I have.

Q. At what points on Breece hill?

The COURT: Never mind the points.

Q. Are you engaged in mining on Breece hill?

A. Only indirectly.

Q. What mines have you been in on Breece hill?

275 The COURT: Mr. McDonald has testified as to his qualifications as a miner. I won't allow the question.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

By Mr. EWING:

Q. Does the filling of these veins differ from the walls?

A. Yes, sir; it does.

Q. In what respect?

A. It is regular vein material carrying gold and silver.

Q. What other mineral, if any?

—. Quartz and iron.

EUGENE STEVENS being recalled as a witness for the defendant, testified as follows:

Direct examination by Mr. EWING:

Q. I will ask you to look at Exhibit "E" and state what that is and if that is what it purports to be?

A. I don't understand your question.

Q. Did you receive any mineral or matter for assay from Mr. McDonald?

A. Yes, sir.

Q. When?

A. On the 22nd of January.

Q. This Mr. McDonald, the gentleman who has just left the witness stand?

A. Yes, sir.

Q. I will ask you to say what you did with it?

A. I assayed it for gold and silver.

Q. Did you make any record of what you found in this assay?

A. Yes, sir.

Q. I will ask you to state whether or not the card marked
276 Exhibit "E" which you hold in your hand is a record of the results?

A. I didn't write this card, but I am very sure that it is copied from the books.

Q. Do the results there given correctly show the contents of the various material given you by Mr. McDonald?

A. Yes, sir; they do.

Exhibit "E" offered in evidence by defendant.

Objected to by plaintiffs for the same reasons that they objected to the testimony of Mr. Mudd.

But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

Said Exhibit "E" is in words and figures as follows:

COPY DEF'T'S EX. "E."

Office of Eugene Stevens, assayer and chemist, 110 East Fourth St.

LEADVILLE, COLO., *Jan.* 22, 1900.

This certifies, that the sample of ore, said to be from the Golden Rod lode, assayed for Mr. J. F. McDonald gave the following result per ton:

No.	Marks.	Silver ounces.	Gold ounces.	Lead per ct.	Iron per ct.	Mang. per ct.	Silica per ct.	Copper per ct.	Zinc per ct.
1	.....	No.....	13-100	.....	.....	.....	.....	.....	.....
2	.....	4-10	11-100	.....	.....	.....	.....	.....	.....
3	.....	Trace ...	09-100	.....	.....	.....	.....	.....	.....
4	.....	5-10	02-100	.....	.....	.....	.....	.....	.....
5	.....	5-10	01-100	.....	.....	.....	.....	.....	.....
6	.....	.....	.....	.....	.....	.....	.....	.....	.....
7	.....	.....	.....	.....	.....	.....	.....	.....	.....

EUGENE STEVENS, *Assayer*,
Per L.

Austin, printer.

Copy Def't's Ex. E.

277 CHARLES SLAVIN being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. Where do you reside, Mr. Slivin?
A. 403——
Q. What is your business?
A. Miner.
Q. How long have you been engaged in mining?
A. Thirty years.
Q. Do you know what is called the Golden Rod or Old Pocket Liner shaft on Breece hill?
A. Yes, sir.
Q. Did you take a lease upon that at any time from Mr. Limberg and Mr. Estey?
A. Yes, sir.
Q. In what year?
A. 1894.
Q. What did you do if anything under that lease?
A. We sunk the shaft.
Q. How deep was the shaft at the time you took the lease?
A. 127 feet.
Q. 127 feet?
A. Somewhere along there.
Q. What was the first thing that you did in the shaft, I mean did you sink or drift?
A. Started to drift.
Q. You started to drift; how far did you drift?
A. About 5 feet.
Q. Then what did you do?
A. Commenced to sink.
Q. How far did you sink?
A. About 150 feet.
Q. 150 feet; then when did you run the drift?
A. Which drift.
Q. You have been in that shaft frequently of course?
A. Yes, sir; I have been working in it right along.
Q. At about 138 feet from the collar of the shaft you run a drift didn't you?
A. Yes, sir.
Q. When did you run that drift?
278 A. We used to work in that drift, there used to be water in the shaft, and mornings we used to work in that drift until the water was out.
Q. How soon was that drift run in to its present depth or distance?
A. How far?
Q. It is now 45 feet in; when was that run in?
A. We worked a little at it all the time we were sinking.

Q. That was done then during the year 1894?
A. Yes, sir.
Q. Now you sunk the shaft from where that drift leaves the shaft on down 150 feet, did you?
A. The first drift or level.
Q. What do you call the first level?
A. 127 feet.
Q. 127 foot?
A. Yes, sir.
Q. What is the second level?
A. About 135 or 136, somewhere along there; I never measured.
Q. Did you begin sinking in the shaft from the second level?
A. From the first level.
Q. When did you begin to sink from the first level?
A. After about four days' work, five feet, started sinking.
Q. Then you started both levels that are now from that shaft from the shaft, did you?
A. Yes.
Q. Did that in 1894?
A. Yes.
Q. Was there any vein or crevice,—vein of mineral in that shaft that you sunk down on?
A. Yes, sir.
Q. Where was that vein, where did you begin working on that vein after you got the lease from Mr. Limberg?
A. Well, it was right from the first start, the vein dipped to the west and run right out.
Q. How far did you go down on it before it run out?
279 A. About five feet.
Q. How large a vein was that?
A. It was from six to eight inches.
Q. In your judgment was it a vein of mineral in rock in place?
A. Yes, sir.
Q. Carrying gold and silver?
A. Well, I never had an assay of it.
Q. Did it carry iron?
A. My partners told me that it did.
Q. From your judgment as a miner was it a vein?
A. Yes, sir; the only vein that I know of in the shaft.

Cross examination of Mr. Slavin by Mr. ELDER:

Q. Mr. Slavin, at what date did you go in possession of the Pocket Liner shaft in January, 1894?
A. About the 22nd of January, 1894.
Q. 22d of January, 1894?
A. That is as near as I can come to it.
Q. Who owned that shaft on the 22d of January, 1894?

Objected to by defendant. Objection sustained.
To which ruling of the court plaintiffs duly excepted.

Q. Mr. Slavin, the date of your lease from Mr. Limberg and Mr. Estey was the 30th of January, 1894; how did you come to go on that property before you got your lease?

Objected to by defendant as incompetent, immaterial and not cross examination.

Objection sustained.

To which ruling of the court plaintiffs duly excepted.

Mr. ELDER: I want to offer as an exhibit a certain paper shown witness and marked Plaintiffs' Exhibit 25.

The COURT: If you want the evidence with regard to that you better make the witness your own. That is not proper cross
280 examination, because nothing has been said about it at all. You are offering a document that is not in the case and are going to cross examine with regard to it.

Mr. ELDER: The court will not allow me to examine with reference to the period from the 22d of January to the 30th of January?

The COURT: It is not a proper subject of cross examination; if you want any evidence with regard to it you must introduce it in the right way.

Mr. ELDER: I can get at that later on.

Q. Mr. Slavin, what did you do the first day you went to work up there?

A. Repaired the collar of the shaft.

Q. How long did you work there before you received this lease on the Golden Rod claim from Mr. Estey and Mr. Limberg?

Mr. CAVENDER: Court please, here is a person who has accepted a lease; they are apparently trying to impugn the title by a lessee. We object.

And the court sustained said objection.

To which ruling of the court plaintiffs duly excepted.

Q. What level did you refer to in the question asked you by Mr. Ewing where you said there was a vein?

A. The first level.

Q. The first level in the shaft?

A. Struck the vein in 1879 in the shaft.

Q. What was the property at that time?

Objected to by defendant. Objection sustained.

A. Drifted 30 feet on the vein.

281 Q. Will you state, Mr. Slavin, in running the lower drift, if you discovered any vein?

Objected to as not cross examination.

The COURT: If you wish to prove it you can make him your own witness.

Mr. ELDER: Here is a witness who is produced on this stand,

whom they asked whether he worked in this shaft and worked this drift, and then they attempt to shut me off from asking the question of Mr. Slavin what he discovered, what he found in the drift that he run.

The COURT: You are not in any — shut off from proving that; you are simply confined to a legitimate cross examination on the subjects on which he was examined.

Q. Mr. Slavin, you have testified that you discovered a vein in this shaft in 1879 at or about the first level; is that correct?

A. About 20 feet up from the first level.

Q. What was the depth from the collar of the shaft to the first level?

A. About 127 feet, along there.

Q. And 20 feet up the shaft you discovered a vein?

A. Yes, sir.

Q. Will you describe to the jury what that vein was, what the material was on each side of the vein?

A. I should judge on each side of the vein was birdseye porphyry, as far as I could see, and the vein she run southwest and northeast, and when we got down to this 127 feet she kind of dipped to the west out of the shaft, and we went straight down with the shaft; she was laying to the west and kind of went out of the shaft.

Q. What did you pass into after going through the vein?

282 A. Porphyry I should call it.

Q. How wide was this vein in places?

A. From five to eight inches.

Q. What was it made up of, what did it consist of?

A. Kind of black talc and white talc.

Q. Did you have any other similar veins higher up in the shaft than 20 feet above that level?

A. No, sir.

Objected to by defendant as not proper cross examination.

The COURT: He has answered no.

Q. Was this the only vein in the shaft from the top to the bottom?

A. That is all I know of.

Q. How deep did you sink the shaft from the upper level?

A. Well, how deep from there down?

Q. Yes.

A. About 150 feet.

Mr. ELDER: Your honor please, we will have to make this witness our witness, and we will take him up now if the other side don't object.

Mr. CAVENDER: We don't care.

The COURT: Very well, go on; the witness is now your witness.

Q. Just look at that; will you state if this name, Charles Slavin, was written by you?

A. Yes, sir.

Q. What is this instrument?
A. A lease.
Q. Who was it from?
A. Mr. Limberg and Mr. ——

The COURT: It speaks for itself.
Mr. ELDER: We offer this lease in evidence, Exhibit 25.
Mr. CAVENDER: We object to it as incompetent, immaterial
283 and does not tend to prove any issues in the cause.
And the court sustained said objection.
To which ruling of the court plaintiffs duly excepted.

Q. Mr. Slavin, at what time did you commence the running of your east drift or lower level?
A. We used to work that when we were hoisting water in the morning.
Q. How long was it that you sunk with a windlass alone?
A. Two weeks.
Q. Two weeks after the 22d of January, 1894?
A. Yes, sir.
Q. Did you put a hoister on then?
A. Yes, sir.
Q. How far out was the east drift two weeks after the 22d day of January?
A. How far out, not at all at that time; afterwards.
Q. You stated when you were on the witness stand for these gentlemen that that drift had been driven in five or six feet before you commenced to sink?
A. That is the north drift.
Q. Then you commenced to sink the shaft immediately on taking possession of the ground.
A. Yes, sir.
Q. How far did you sink before commencing *the* drive the east drift?
A. About 25 feet; I never measured, I should judge about 25 feet.

The COURT: I would like to know before you proceed further what you are intending to rebut by this witness.
Mr. ELDER: We are intending to rebut by this witness the proof of the existence of any vein of any character in that drift by a miner who drove the drift himself.

Q. Will you state what you found in the east drift, if anything?
A. Didn't find nothing but porphyry.
Q. Did you find any slips in the rock?
284 A. There was slips and seams in the rock, clay slip.
Q. Were you searching for pay mineral?
A. There wasn't any pay mineral that I could see.
Q. Was there any mineral at all in that drift?
A. No, sir.
Q. How did you come to work in that drift?

A. Started that drift as I said before, when we was taking out water so we wouldn't be idle, drove east on that drift thinking we might find something.

Q. How did you come to drive east on that drift when the vein that you spoke of above dipped to the west?

A. It was down 25 or 30 feet further and we thought we would test that side.

Q. Did you find anything in your east drift equal to what you found above?

A. No, sir.

Q. Did you find anything in your drift like what you found above?

A. No, sir.

Q. Did you have any assays taken out of that drift?

A. I had none.

Q. A partner of yours, Mr. King, on the witness stand testified to getting an assay down there?

A. Well, he used to come over there; he was hauling ore from the Little Vinnie at that time, he used to come over there, and he was down there I think twice, came down there and looked around one time and went up again.

The COURT: That is not responsive at all.

Q. Did Mr. King work in that shaft at all, or drift?

A. No, sir.

Q. While you were working in that shaft did anybody notify you, or any of your partners, of a claim on that ground?

A. Yes, sir.

Q. Who was it and when was it?

Objected to by defendants. Objection sustained.
285 To which ruling of the court plaintiffs duly excepted.

Q. What did you do when this party notified you of a claim?

Objected to by defendants. Objection sustained.
To which ruling of the court plaintiffs duly excepted.

Q. At what time after the 22d of January, 1894 did you first hear of the Golden Rod claim?

Objected to by defendant as immaterial and incompetent. Objection sustained.
To which ruling of the court plaintiffs duly excepted.

Q. Mr. Slavin, did you see Mr. W. L. G. Smith on that ground at any time during the week commencing the 22d of January to the 27th of January?

A. Saw him on the 27th.

Q. Did you have any conversation with him with reference to the Golden Rod claim then?

A. I did not.

Q. Will you state if you saw anybody working in what is known as the discovery shaft of the Golden Rod claim?

A. No, sir; I did not.

Q. Do you know where the Golden Rod discovery shaft is located?

A. I know where it is; I never was to it; I saw it at a distance.

Q. When did you first see the discovery shaft of the Golden Rod claim?

A. About the 26th of January, 1894.

Q. Did you see any stakes there?

A. Well, I couldn't say. I was at a distance, I wasn't right up to it.

Q. Did you see any other shaft near that shaft?

A. Yes, sir; there was another shaft there.

Q. At what date did you see those two shafts first?

286 A. About the 26th of January I first saw them.

Q. How far did you pass away from this shaft in going up on the hill?

A. A hundred feet.

Q. Was the trail at that time as close as a hundred feet?

A. Well, I should judge about that; it might not be so close; as far as my opinion——

Q. You said that you saw those two shafts on the 26th of January side by side?

A. Yes, sir.

Q. Do you know what the depth of the Golden Rod shaft was on the 26th of January?

A. No, sir.

Q. Did you see those two shafts on subsequent days?

A. I was not up to those two shafts at all; my partner Mr. Walsh told me.

No cross-examination.

THOMAS W. JAYCOX being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. You are a civil engineer by profession are you not, Mr. Jaycox?

A. Yes, sir.

Q. Have you ever made a survey of what is known as the Golden Rod Lode claim?

A. I made a survey of the Golden Rod Lode claim for the amended location.

Q. I will ask you to go to that map and state to the jury what those different lines represent briefly as you can?

A. The black lines represent the amended location of the Golden Rod and the red lines represent the Eulalie official survey.

287 Q. How does that compare with the original lines of the Golden Rod, the red lines?

A. Well, they are supposed to be identical with the Golden Rod original location.

Q. The red lines as the original Golden Rod location?

A. Yes, sir.

Q. And the black lines as now amended?

A. Yes, sir.

Q. What does this represent?

A. The discovery shaft of the original location of the Golden Rod.

Q. What does this represent?

A. The discovery shaft of the amended location of the Golden Rod lode.

Q. Is that the same shaft termed here in this trial as the Golden Rod or Pocket Liner shaft?

A. To the best of my information it is; yes, sir.

Q. On the point of Breece hill, is it not?

A. Yes, sir.

Q. Did you make the amended location certificate of the Golden Rod?

A. Yes, sir.

Q. I will ask you to state whether or not that is the certificate?

A. This is my handwriting, yes, sir, except the signature.

Paper marked for identification Exhibit "F."

Q. I will ask you what you did with reference to putting down the corners or posts and marking it on the ground?

A. All the corners were marked by substantial posts as indicated on the map, numbered as there shown from 1 to 10 inclusive, with the name of the lode and number of the corner.

Q. How are the center posts marked?

A. I don't know as you can call any of them center posts except 3 and 8; those were marked.

Q. On the side next to the claim?

288 A. Yes, sir; and the corners marked next to the claim.

Q. In your amended certificate what did you call for, which shaft did you call for as the discovery shaft?

A. The one on the western end of the claim, marked on the map discovery shaft of the Golden Rod, amended location.

Q. And that is the top of the shaft, is it?

A. Yes, sir.

Q. The shaft spoken of here in this trial?

A. Yes, sir.

Mr. EWING: I desire to introduce first the amended location certificate marked Exhibit "G," by the Ferrum Mining Company of the Golden Rod lode, and dated December 14, 1894, and recorded—

I offer now the original location certificate, dated January 26th,

1894, of the Golden Rod Lode mining claim by Mr. Limberg and Mr. Estey, recorded in the recorder's office on the 29th day of January, 1894, marked Exhibit "A."

Plaintiffs object to the introduction of Exhibit A for the same reasons that plaintiffs have objected to the introduction of the lease to Mr. Charles Slavin and Thomas Walsh.

But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

Said Exhibit "A" is in words and figures as follows, that is to say:

289 Mr. EWING: I offer Exhibit "G," the amended location certificate, dated December 14, 1894, recorded on December 14, 1894 by the Ferrum Mining Company.

Objected to by plaintiffs on the same grounds.

Objection overruled, with understanding that title will be connected.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

Said Exhibit "G" is in words and figures as follows, that is to say:

290 COPY OF DEFENDANT'S EXHIBIT "G."

STATE OF COLORADO, } ss:
County of Lake, }

Know all men by these presents, that the Ferrum Mining Company by Robert B. Estey, president, the undersigned, has this 14th day of December, A. D. 1894, amended, located and claimed, and by these presents, does amend, locate and claim, by right of the original discovery and this additional and amended location certificate, in compliance with the mining acts of Congress, approved May 10, A. D. 1872, and all subsequent acts, and with section 2409 of the General Statutes of Colorado, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Golden Rod lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits, and surface ground, within the lines of said claim, 1100 feet running N. 77° 31′ W. from center of discovery shaft, and 400 feet running S. 77° 30′ E. from center of discovery shaft, said discovery shaft being situate upon said lode, vein, ledge or deposit, and within the lines of said claim, in California mining district, county of Lake, and State of Colorado, described by metes and bounds, as follows, to-wit:

Beginning at corner No. 1 identical with cor. No. 1 of U. S. survey

No. 427 Winter lode thence N. 12° 30′ E. 300 ft. to cor. No. 2,
291 thence N. 77° 30′ W. 750 ft. to side center post, and same course 1500 ft. to cor. No. 3, thence S. 12° 30′ W. 300 ft. to cor. No. 4, thence S. 77° 30′ E. 750 ft. to side center post, and same course 1500 ft. to cor. No. 1, the place of beginning. Magnetic variation 14° 30′ E. This claim is situated on Breece hill, and adjoins U. S. surveys No. 716, 471, and 3613.

This being the same lode originally located on the 25th day of January, A. D. 1894, and recorded on the 29th day of January, A. D. 1894, in Book 133 page 6, in the office of the recorder of Lake county, this further additional and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description or record, and of taking in and acquiring all forfeited or abandoned overlapping ground, and of taking in any part of any overlapping or cancelled claim which has been abandoned or cancelled and of securing all the benefits of said sec. 2409 of the General Statutes of Colorado.

THE FERRUM MINING COMPANY,
By ROBERT B. ESTEY, *President.* [SEAL.]

Said lode was discovered on the 25th day of January, A. D. 1894.
Attest: —— ——.

Date of location Jan. 25th, A. D. 1894.
Date of additional and amended certificate Dec. 14th, A. D. 1894.

292 (Endorsed.)

Certified copy No. 1357. 95495. Amended location certificate. Compared. On the Golden Rod mining claim of the Ferrum Mining Company in California mining district, Lake county, State of Colorado.

STATE OF COLORADO, } ss:
County of Lake, }

I hereby certify, that this location certificate was filed for record in my office at 2:51 o'clock p. m., December 14, 1894, and is duly recorded in Book 115 at page 354.

J. W. NEWELL, *Recorder.*
H. W. WOODWARD, *Deputy.*

Fees $1.25.

(Attached slip.)

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a

true and correct copy of ad. and am. loc. cert. No. 95495 as it appears of record in my office, in Book 115, page 354.

Witness my hand and official seal, this 24th day of January, 1900.

H. S. PHILLIPS,
Clerk and Recorder,
[SEAL.] By A. LEPPEL, *Deputy.*

[Documentary stamp.]

296 Mr. EWING: I offer Exhibit "F" just identified by Mr. Jaycox, dated March 8th, 1895 and recorded on March 8th, 1895.

Plaintiffs object on the same ground and the additional objection that the certified copy of the records of Lake county disclose a difference in reference to the statement upon the face of the paper. And there appears to be a scratch mark. The certified copy shows said lode was discovered on the 25th day of January, 1895; the original with the apparent scratch mark at the end of the 189 appears to have a scratch and a 4 upon it. We object to the admission of the location certificate until the appearance of that paper is accounted for.

Q. Mr. Jaycox, were those figures made by you?
A. To which figures do you refer?
Q. The figure in the date?
A. Said lode discovered the 25th day of January, 1894?
Q. Yes, sir?
A. The ink marks were written by myself.
Q. Did you ever change that after the instrument was recorded from 1895 to 1894?
A. No, sir.
Q. The instrument was made out that way?
A. Yes, sir; to the best of my knowledge.

And the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

Said Exhibit "F" is in words and figures as follows, that is to say:

293 COPY OF DEFENDANT'S EXHIBIT "F."

STATE OF COLORADO, } ss:
County of Lake, }

Know all men by these presents, that the Ferrum Mining Company, by Robert B. Estey, president, the undersigned, has this 6th day of March A. D. 1895, amended, located and claimed, and by these presents, does amend, locate and claim, by right of the original discovery and this additional and amended location certificate, in compliance with the mining acts of Congress, approved May 10

A. D. 1872, and all subsequent acts, and with sec. 2409 of the General Statutes of Colorado, and with local customs, laws and regulations, 1459.57 linear feet and horizontal measurement on the Golden Rod lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground within the lines of said claim, 363.45 feet running N. 71° 11′ W. from center of discovery shaft and 391.15 feet running S. 83° 51′ E. from center of discovery shaft and thence running S. 77° 45′ E. 450 feet and thence S. 66° 25′ E. 254.97 feet said discovery shaft being situate upon said lode, vein, ledge or deposit, and within the lines of said claim, in California mining district, county of Lake, and State of Colorado, described by metes and bounds, as follows, towit:

Beginning at corner No. 1 whence cor. No. 1 sur. No. 427 Winter lode bears N. 12° 15′ E. 50.11 ft. Goat's peak bears S. 82°
294 14′ E. thence N. 66° 25′ W. 254.97 ft. to cor. No. 2 thence N. 77° 45′ W. 450 ft. to cor. No. 3 thence N. 83° 51′ W. 391.15 ft. to cor. No. 4 thence N. 71° 11′ W. 363.45 ft. to cor. No. 5, identical with cor. No. 4 sur. No. 427 whence Homestake peak bears N. 48° 04′ W. Mt. Elbert bears S. 51° 13′ W. thence N. 12° 15′ E. 300 ft. to cor. No. 6 thence S. 71° 11′ E. 363.45 ft. to cor. No. 7 thence S. 83° 51′ E. 391.15 ft. to cor. No. 8 thence S. 77° 45′ E. 450 ft. to cor. No. 9 thence S. 66° 25′ E. 254.97 ft. to cor. No. 10 thence S. 12° 15′ W. 300 ft. to cor. No. 1 the place of beginning. Magnetic variation 14° E.

This being the same lode originally located on the 25th day of January A. D. 1894, and recorded on the 29th day of January, A. D. 1894, in Book 133, page 6, in the office of the recorder of Lake county, this further additional and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description, or record, and of taking in and acquiring all forfeited or abandoned, overlapping ground, and of taking in any part of any overlapping claim which has been abandoned or cancelled, and of securing all the benefits of said section 2409 of the General Statutes of Colorado.

THE FERRUM MINING CO.,
By ROBERT B. ESTEY, *President.* [SEAL.]

Said lode was discovered on the 25 day of January A. D. 189$\overset{4}{(5)}$.
Attest: —— ——.

Date of location Jan. 25th A. D. 1894.
Date of additional and amended certificate March 8th A. D. 1895.

295 Endorsed.

Certified copy No. 1368. No. 97117. Compared.

Amended location certificate. On the Golden Rod mining claim of the Ferrum Mining Company in California mining district, Lake county, State of Colorado.

STATE OF COLORADO, } ss:
County of Lake, }

I hereby certify, that this location certificate was filed for record in my office at 2:05 o'clock p. m. M'ch 8th 1895 and is duly recorded in Book 165 page 12.
Fees $1.25.

J. W. NEWELL, *Recorder.*
H. W. WOODWARD, *Dep.*

Attached slip.

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid do hereby certify that the within and foregoing is a true and correct copy of am. loc. cert. No. 97117 as it appears of record in my office, in Book 165, page 12.
Witness my hand and official seal this 24th day of January 1900.

[SEAL.] H. S. PHILLIPS,
Clerk and Recorder,
By A. LEPPEL, *Deputy.*

[Documentary stamp.]

297 Mr. EWING: I desire to offer in evidence a deed from Robert B. Estey and Charles T. Limberg to The Ferrum Mining Company, the defendant in this suit, dated the 21st day of November, 1894, acknowledged and recorded on the 23d day of November, 1894, marked for identification Exhibit H.

To which deed plaintiffs object on the same ground as the objection to lease to Slavin and Walsh.

But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

Said Exhibit "H" is in words and figures as follows, to wit:

EXHIBIT "H."

Mining Deed.

Cons. $1. The Golden Rod lode.

Robert B. Estey and Charles T. Limberg
to
The Ferrum Mining Co.

Date Nov 21, 1894,
Ack. Nov. 23, 1894,
Recorded 11:58 a. m. Nov. 23, 1894.
Book 148, p. 584.

298 Mr. EWING: I desire to offer certified copy of the articles of incorporation of the Ferrum Mining Company, filed with the secretary of state on the 30th of October, 1894, and marked for identification Exhibit "I." I simply introduce that to show the time of our incorporation. They allege our incorporation.

To which Exhibit "I" plaintiffs object on the same ground stated in the objection to the lease to Walsh and Slavin.

But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

Exhibit "I" is in words and figures as follows, that is to say:

EXHIBIT "I."

The Ferrum Mining Co. Cap., $500,000. Shs., 100,000. Par val., $5. Term, 20 yrs.

Incorporators:
Chas. T. Limberg,
W. L. Thompson,
Geo. E. Taylor,
John A. Ewing,
Robert B. Estey.

To acquire min. property etc.
Ack. Oct. 30, 1894.
Filed in office sec'y state of Colorado Oct. 31, 1894.

COPY OF DEFENDANT'S EXHIBIT "J."

(Here follows diagram marked page 299.)

300 R. B. ESTEY being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Mr. EWING: This map will be offered as Exhibit "J."

Q. Were you a citizen of the United States, Mr. Estey, in January 1894?
A. Yes, sir.
Q. What is your age?
A. Most 63 years old.

Mr. EWING: We offer in evidence affidavit of labor of the Golden Rod claim for 1895, recorded on December 13, 1895 and marked for identification Exhibit "K."

Plaintiffs object to Exhibit "K" because it is not sworn to in due form, having no jurat of the county.

But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

Exhibit "K" is in words and figures as follows, to-wit:

301 COPY OF DEFENDANT'S EXHIBIT "K."

STATE OF COLORADO, *County of* ——, } *ss:*

Golden Rod lode.

Before me, the subscriber, personally appeared John Moler, Jesse J. Ernest who, being duly sworn, saith that at least one hundred dollars' worth of work or improvements were performed or made upon the Golden Rod lode, situated in California mining district, county of Lake, State of Colorado, as recorded in Book — page — of the records of said Lake county.

Such expenditure made by or at the expense of Rob't B. Estey, W. L. Thompson & Chas. T. Limberg owners of said claim, for the year ending Dec. 31st, 1895 and for the purpose of holding said claim. Such expenditure made between 8th day of November 1895 and 12th day of Dec. 1895.

JOHN MOLER.
JESSE J. ERNEST.

Subscribed and sworn to before me, this 13th day of December, A. D. 1895.

ALBERT TREGO,
Notary Public.

[NOTARIAL SEAL.]

My commission expires Oct. 26, 1898.

Certified copy No. 1370. No. 100702. Affidavit of labor and improvements. Compared. Golden Rod lode.

STATE OF COLORADO, } ss:
Lake County, }

Filed for record this 13th day of Dec. 1895, at 12:11 o'clock p. m. Recorded in Book 75, page 236.

J. W. NEWELL, *Recorder.*
R. O. NORTH, *Deputy.*

Fees 50c.

302 (Attached slip.)

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid do hereby certify that the within and foregoing is a true and correct copy of aff. of labor No. 100702 as it appears of record in my office, in Book 75, page 236.

Witness my hand and official seal, this 24th day of January, 1900.

H. S. PHILLIPS,
Clerk and Recorder,
[SEAL.] By A. LEPPEL, *Deputy.*

[Documentary stamp.]

303 Mr. EWING: I offer in evidence affidavit of labor of the Ferrum Mining Company, dated the 9th day of November 1896, and recorded in this county December 16, 1896, and marked for identification Exhibit "L."

Plaintiffs object to Exhibit "L" purporting to be an affidavit of labor for the year 1896, for the reason that the notary's certificate is dated the 9th day of December, 1896, and the work as stated upon the face of the instrument was not completed until the 15th day of December, 1896, evidently having been sworn to in blank. But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

Exhibit "L" is in words and figures as follows, that is to say:

304 COPY OF DEFENDANT'S EXHIBIT L.

STATE OF COLORADO, } ss:
County of Lake, }

Golden Rod lode.

Before me, the subscriber, personally appeared Jas. M. Cabell and —— Lundell, who, being duly sworn, saith that at least one hundred ($100.00) dollars' worth of work or improvements were performed or made on the Golden Rod lode, situated in California mining district, county of —— State of Colorado. Such expendi-

ture made by or at the expense of the Ferrum Mining Company owners of said claim, for the year ending December 31st, 1896 and for the purpose of holding said claim. Such expenditure made between 30th day of November and 15th day of December 1896.

JAS. M. CABELL.
PIET LUNDELL.

Subscribed and sworn to before me this ninth day of December, A. D. 1896.

ALBERT TREGO,
Notary Public.

[NOTARIAL SEAL]

My commission expires Oct. 26, 1898.

(Endorsed.)

Certified copy No. 1372. No. 104,719. Affidavit of labor and improvements. Compared. Golden Rod lode.

STATE OF COLORADO, } ss:
County of Lake, }

Filed for record this 16th day of December, 1896, at 2.56 o'clock p. m. Recorded in Book 75, page 332.

P. F. GILDEA, *Recorder,*
By THOMAS GILDEA, *Deputy.*

Fees: ——.

(Attached slip.)

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of aff. of labor No. 104,719 as it appears of record in my office in Book 75 page 332.

305 Witness my hand and official seal this 24th day of January, 1900.

H. S. PHILLIPS,
Clerk and Recorder,
By A. LEPPEL, *Deputy.*

[SEAL.]

[Documentary stamp.]

306 Mr. ELDER: I wish to make the further objection that this work was performed under the supervision of one John McCombe. It is alleged in our pleadings. We will of course follow it up. I want to get this objection in at this time.

The COURT: You cannot object to the document except for something appearing upon the face of it.

Mr. EWING: I offer in evidence Exhibit "M," affidavit of labor performed on the Golden Rod lode for 1897 and sworn to on the 21st day of December, 1897 and filed for record in this county on the 22d day of December, 1897.

Mr. ELDER: I want to object to all of these papers on the same ground as to the introduction of the lease to Slavin and Walsh.

But the court overruled said objection.

To which ruling of the court plaintiffs duly excepted.

Said Exhibit "M" is in words and figures as follows, to-wit:

307 COPY DEFENDANT'S EXHIBIT "M."

STATE OF COLORADO, } ss.:
Lake County, }

Golden Rod lode.

Before me, the subscriber, personally appeared John Waters, M. M. Regan who, being duly sworn, saith that at least one hundred dollars' worth of work or improvements were performed or made upon the Golden Rod lode, situate in California mining district, county of Lake, State of Colorado between the first day of December, A. D. 1897, and twenty-first day of December, A. D. 1897. Such expenditure was made by or at the expense of Furnum Mining Company owners of said claim, for the purpose of complying with the law and holding said claim.

his
JOHN x WATERS.
mark.

Witness:
NORMAN M. ESTEY.
MARTIN M. REGAN.

Subscribed and sworn to before me, this 21st day of December, A. D. 1897.

H. D. LEONARD,
Notary Public.

[NOTARIAL SEAL.]

My commission expires May 9, 1899.

Endorsed.

Certified copy No. 1374. No. 108451. Compared. Affidavit of labor and improvements. Golden Rod lode.

STATE OF COLORADO, } ss.:
Lake County, }

Filed for record this 22nd day of Dec. 1897, at 10:25 o'clock a. m. Recorded in Book 75 page 412.

P. F. GILDEA, *Recorder.*
M. E. DOOLEY, *Deputy.*

Fees $.50.

308 Attached slip.

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid do hereby certify that the within and foregoing is a correct copy of aff. of labor No. 108451 as it appears of record in my office, in Book 75 page 412.

Witness my hand and official seal, this 24th day of January 1900.

H. S. PHILLIPS,
Clerk and Recorder,
By A. LEPPEL, *Deputy.*

[SEAL.]

[Documentary stamp.]

309 Mr. EWING: I offer in evidence Exhibit "N," an affidavit of labor performed on the Golden Rod lode during the year 1898; the affidavit is dated the 12th day of November, 1898 and it is recorded on the 15th day of November, 1898 in this county.

To which plaintiffs objected on the same ground.

Objection overruled. Plaintiffs excepted.

Exhibit "O," affidavit of annual labor performed on the Golden Rod Lode mining claim for the year 1899, dated the 13th of October, 1899 and recorded the 14th day of October, 1899, offered in evidence by defendant.

Plaintiffs object to the introduction of the same on the same grounds as before.

Objection overruled.

To which ruling of the court plaintiffs duly excepted.

Said Exhibits "N" and "O" are in words and figures as follows, to-wit:

310 COPY OF DEFENDANT'S EXHIBIT N.

STATE OF COLORADO, } ss:
Lake County, }

Golden Rod lode.

Before me, the subscriber, personally appeared Joseph Hopkins who, being duly sworn, saith that at least one hundred dollars' worth of work or improvements were performed or made upon the Golden Rod lode situated in California mining district, county of Lake State of Colorado. Such expenditure made by or at the expense of the Ferrum Mining Company owners of said claim, for the year ending December 31st, 1898 and for the purpose of holding said claim. Such expenditure made between 26th day of October 1898 and 12th day of November 1898.

JOSEPH HOPKINS.

[Documentary stamp.]

Subscribed and sworn to before me, this 12th day of November, A. D. 1898.

My commission expires January 10th, 1902.

HENRY A. RUPP,
Notary Public.

[NOTARIAL SEAL.]

(Endorsed.)

Certified copy. No. 1375. No. 111505. Compared. Affidavit of labor and improvements. Golden Rod lode.

STATE OF COLORADO, } ss:
Lake County, }

Filed for record this 15th day of November 1898, at 10:09 o'clock a. m. Recorded in Book 75, page 463.

H. S. PHILLIPS, *Recorder.*
D. G. HOUGHTON, *Deputy.*

Fees $.50.

311 (Attached slip.)

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of aff. of labor No. 111505 as it appears of record in my office, in Book 75, page 463.

Witness my hand and official seal this 24th day of January, 1900.

H. S. PHILLIPS,
Clerk and Recorder,
By A. LEPPEL, *Deputy.*

[SEAL.]

[Documentary stamp.]

312 COPY OF DEFENDANT'S EXHIBIT O.

STATE OF COLORADO, } ss:
County of Lake, }

Golden Rod lode.

Before me, the subscriber, personally appeared Joseph Hopkins and Frank McCune, who, being duly sworn, saith that at least one hundred dollars' worth of work or improvements were performed or made upon the Golden Rod lode, situated in California mining district, county of Lake, State of Colorado. Such expenditure made by or at the expense of the Ferrum Mining Co. owners of said claim, for the year ending December 31st 1899 and for the purpose of holding said claim.

JOSEPH HOPKINS.
F. McCUNE.

Subscribed and sworn to before me this 13th day of October A. D. 1899.

My commission expires May 22nd, 1903.

H. D. LEONARD,
Notary Public.

[NOTARIAL SEAL.]

(Endorsed.)

Certified copy. No. 1376. No. 114666. Compared. Affidavit of labor and improvements. Golden Rod lode.

STATE OF COLORADO, } ss:
Lake County, }

Filed for record this 14th day of October, 1899, at 10:30 o'clock a. m. Recorded in Book 75, page 525.

H. S. PHILLIPS, *Recorder.*
D. G. HOUGHTON, *Deputy.*

Fees $.—.

313 (Attached slip.)

STATE OF COLORADO, } ss:
County of Lake, }

I, H. S. Phillips, clerk and recorder, in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of aff. of labor No. 114,666 as it appears — record in my office, in Book 75, page 525.

Witness my hand and official seal, this 24th day of January, 1900.

H. S. PHILLIPS,
Clerk and Recorder,
By A. LEPPEL, *Deputy.*

[SEAL.]

[Documentary stamp.]

314 JOSEPH HOPKINS being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. State your name to the jury?
A. Joseph Hopkins.
Q. Where do you reside?
A. Adelaide Park.
Q. How long have you resided in Lake county?
A. I have resided in Lake county for thirteen years.
Q. Do you know what is called the Golden Rod shaft, on the brow of Breece hill in this county?
A. Yes, sir.
Q. Sometimes called here in this trial the Pocket Liner shaft?
A. Yes, sir.

Q. You know that shaft?
A. I know where it is.
Q. You have been there, have you?
A. Yes, sir; I have been there.
Q. Did you do any work in 1899?
A. Yes, sir.
Q. Are you familiar with the value of work in this camp?
A. Well, yes.
Q. Will you state what work did you do there in 1899 and at whose request, who paid you for it if you were paid?
A. Well, Mr. Limberg and Mr. Estey paid me for it, and they had me to do the work.
Q. What time in the year was it done?
A. Well, I think it was in 1899, I think I commenced that work in September, the 25th or 26th of September.
Q. Who worked with you?
A. Why, a man by the name of Frank McEwen.
Q. What was the work and material put in there worth?
A. Well, I don't know what the material cost, but I know
315 that I put in 12 sets of timbers besides the lumber for four sets of lining boards.
Q. Well, what were you paid for it?

Objected to by plaintiffs because the amount paid does not prove the value of the work.
Objection sustained.

Q. What was the reasonable worth of the material and the work—what was the work worth?
A. Why, we were fixed for doing that work; it was worth a hundred dollars, material and labor.

Mr. ELDER: We move to strike that out because the answer is qualified by the statement, Why, we were fixed for doing that work, it was worth a hundred dollars.
The COURT: You may answer that question directly; strike that out.

Q. How much was it worth, the work that you actually did there with the parties with you, and the material put in there at that time?
A. Well, my partner and myself got $90 for doing that work.

Objected to by plaintiffs.
The COURT: You can answer the question directly; what was the work worth. You don't have to explain it in any way; what was the work worth?

A. Well, sir, it was worth a hundred dollars.

Mr. CAVENDER: I desire to ask him how much he received.
The COURT: You can do so.

Q. How much did you receive?
A. I received $45 and my partner the same.
Q. Who furnished the material, the timbers that were put in?
A. Mr. Limberg and Mr. Estey.
Q. Did you receive your pay, $90, from Mr. Limberg and
316 Mr. Estey for the company?
A. Yes sir, Mr. Limberg paid me that money.
Q. You don't know what the value of the timber was that was put in?
A. No, sir; I don't.

Cross examination of Mr. HOPKINS by Mr. ELDER:

Q. You said that you put in 12 sets of timbers?
A. Yes, sir.
Q. What did you do with the old sets of timbers in the shaft?
A. Well, I think we have hoisted most of them out.
Q. Did you drop any of them down the shaft?
A. There may be one or two dropped down, didn't any if we could help it.
Q. What did you do with the earth that was broken?
A. We hoisted it.
Q. Hoisted the earth?
A. Yes, sir.
Q. What has been your experience in timbering in shafts?
A. Well, I have never done much work timbering except what little work I would do for myself.
Q. How many plats did you put in the shaft?
A. Well, I used to go down five or six feet the first time and put in a plat, and then when I would make room for the timbers put them in and move my plat down again. I put a plat in twice while I was retimbering the last time some years before.
Q. How long were you occupied in putting a windlass upon the collar of the shaft?
A. How long was I occupied?
Q. Occupied in fitting up a windlass for the shaft?
A. Well, I don't know that it took a very long time, may be half a day.
Q. Half a day?
A. Yes.
Q. How many sets of timbers did you put in the first day?
A. Well, I couldn't say; of course I had to take out the
317 ground before I put the timbers in.
Q. Did you put in any sets of timbers the first day?
A. No, sir; I did not.
Q. Did you put in any sets of timbers the second day?
A. No, sir; I did not.
Q. Did you put in any sets of timbers the third day?
A. No.

Q. Did you put in any sets of timbers the fourth day?

A. I didn't put any sets of timbers in until the sixth or seventh day I worked there.

Q. How many timbers did you put in the sixth or seventh day?

A. I suppose I put in five or six sets.

Q. You suppose you put in five or six sets the sixth or seventh day; what were you doing in the period between the first and the sixth or seventh day?

A. I was working down below shooting out this ground.

Q. How many shots was necessary to trim the shaft?

The COURT: I don't think it is necessary to go into that.

Q. How many sets did you put in on the seventh day?

A. Well, after I got the ground shot out and room for the timbers I suppose I put in may be four or five sets the sixth or seventh day.

Q. The sixth or seventh day you put in four or five sets?

A. Yes.

Q. Well, what did you put in the eighth day?

A. Well, I commenced shooting, commenced to move my plat down again for the next sets.

Q. And how many sets of timbers did you put in the ninth day?

A. I couldn't say whether I had the ground shot out the 9th day or not.

318 Q. On the tenth day did you put in any?

A. I couldn't say.

Q. On the eleventh day did you?

A. I couldn't say; I know I put in twelve sets of timbers while I worked there.

Q. Twelve sets of timbers while you worked there?

The COURT: What is the purpose of this?

Mr. ELDER: The total value of timbering a shaft 40 or 50 feet deep does not exceed at any time forty or fifty dollars.

The COURT: You can't prove it that way.

Mr. ELDER: I can prove what work he did and follow it up later.

The COURT: I don't think that cuts any figure; they said it was worth a hundred dollars.

Q. You did the annual assessment work in that shaft in the year 1898, did you not?

Objected to by defendant as not cross examination.

Objection sustained.

Mr. ELDER: We will make him our witness then.

The COURT: Put him on in the regular order then. The certificate of labor is *prima facie* on that subject. You better take it in the regular order.

Q. At what point in the shaft was this last ten feet of timbering put down.

Mr. EWING: I didn't say anything about ten feet.

Q. How much is twelve sets of timbers?
A. Twelve sets of timbers the size of them timbers will timber ten feet.
Q. At what point did you put the timber in the shaft?
A. I put them in from the bottom of the other timbers that
319 was put in before.
Q. How deep do you think this was down the shaft?
A. I never measured that shaft.
Q. The timbers put in before were put in by you, were they not?
A. Yes, sir.
Q. How many sets of those?
A. Twelve sets.
Q. Another ten feet?
A. Yes, sir.
Q. That was the year 1898?

Mr. EWING: We ask that it be stricken out.
The COURT: Strike it out.

ELMER E. FRITZ being called as a witness for the defendant and duly sworn, testified as follows:

Direct examination by Mr. EWING:

Q. State your name; you have been sworn?
A. Yes, sir; Elmer E. Fritz.
Q. What is your business?
A. Miner.
Q. How long have you been engaged in mining?
A. Seventeen years.
Q. Where?
A. In Lake, Summit and Eagle.
Q. In Colorado, have you?
A. Yes, sir; Colorado.
Q. How long in Leadville or Lake county last past?
A. Why, about sixteen years.
Q. Do you know what is called and termed the Golden Rod shaft, sometimes called the Pocket Liner shaft, on top of Breece hill?
A. Yes, sir.
Q. I will ask you if you had any work done there, if any
320 work was done there in 1899 by the Ferrum Mining Company?
A. Yes, sir, I had work done there.
Q. How much work did you have done?

Objected to by plaintiffs because defendant has already shown work to the value of one hundred dollars in that shaft, and until it is rebutted they can go no further.

The COURT: They have a right to introduce four witnesses on that point if they desire. The objection is overruled.
(Question read to the witness)

A. Fifteen shifts at three dollars a day and nine shifts at three and a half.
Q. Between what dates was that?
A. That was from the 23d of December.
Q. 1899?
A. Yes, sir.
Q. Until when?
A. I will have to look at the time book.
Q. Look at it and refresh your memory?
A. (Referring to book) To the 31st of December; it was all done in December.
Q. It was all done in December?
A. Yes, sir.
Q. What did that work consist of?
A. Cleaning out the shaft and cleaning out 45 feet of the drift.
Q. I will ask you to state to the court and jury what that work was reasonably worth, was worth at that time?
A. Why, they got value received for the work done.
Q. Well, how much did that amount to?
A. $76.50.
Q. Did that include your time?
A. No, sir.
Q. How much time did you put in there in looking after it?
A. Three days.
321 Q. What is your time reasonably worth?
A. It was worth four dollars a day.
Q. Was it paid for by the Ferrum Mining Company?
A. Yes, sir.

Cross-examination of Mr. FRITZ by Mr. ELDER:

Q. What men were employed at this time?
A. Vigersol, Baker, Leedy and Hopkins.
Q. What did the work consist of the first day, the 23d of December?
A. Putting up the windlass and commenced work in the bottom.
Q. Putting up the windlass and commenced work in the bottom?
A. Yes, sir; cleaning out the shaft.
Q. At what point in the shaft did the work commence?
A. Put in scaffold below the first level six or eight feet.
Q. What is that?
A. Six or eight feet; I didn't measure it.
Q. What was the next work, what was the work that was done?
A. Cleaning out the shaft.
Q. How long did it take to clean out the shaft to the lower level?

A. I can tell you in a minute (referring to book) to the 28th.
Q. From the 23d to the 28th?
A. Yes, sir.
Q. Was there any shifts lost in that period of time?
A. One shift Sunday the 25th.
Q. Sunday the 25th; Christmas came on Sunday this last year?
A. Well, I don't know, it was the 25th, I don't know that it was Sunday, I suppose it was Christmas. I worked just the same.
Q. On the 28th you finished cleaning out the shaft to the lower level?
A. Yes, sir.
Q. What did you do on the 29th, 30th and 31st?
A. Cleaning out the drift.
322 Q. How far was the drift, how far was the lower drift filled?
A. It was filled some all along, it wasn't filled full.
Q. Clear to the face of the drift?
A. Yes, sir; there is some in the face yet.

CHARLES T. LIMBERG being recalled for the defendant, testified as follows:

Direct examination by Mr. EWING:

Q. I will ask you to state what you did with reference to whether or not you sent any lumber up in 1899 for the purpose of timbering this shaft?
A. Yes, sir.
Q. How much was that lumber worth?
A. $16.50, hauling and making there now (referring to book) $16.55.
Q. How much did you pay Mr. Hopkins and the gentlemen who worked with him?
A. I paid Mr. Hopkins $45.22; I paid Mr. McCune $45.
Q. Have you paid for the work that was done later on in the year 1899?
A. Yes, sir.
Q. By Mr. Fritz?
A. Yes, sir.
Q. How much and who have you paid for that?
A. I paid in the pay roll $76.50, and then Mr. Fritz $12, $88.50.
Q. Did you furnish any material, supplies?
A. Well, there is the hardware bill, sometimes the hardware bill went up to $9.45. I have the bill here.
Q. On what account was that paid?
A. For the account of the Ferrum Mining Company.

No cross examination.

323 Defendant's Exhibits "B," "C" and "D" heretofore offered in evidence are in words and figures as follows, to-wit:

324 Defendant rests.

Thereupon the plaintiffs to further sustain the issues herein in their behalf in rebuttal gave in evidence as follows, that is to say:

ANDREW GOODWILL being called as a witness for the plaintiffs in rebuttal, testified as follows:

Direct examination by Mr. ELDER:

The COURT: We may save time if you would state what part of defendant's testimony you intend to rebut by this witness.

Mr. ELDER: To rebut the evidence of the discovery of a vein or lode of mineral in place in the east drift.

Q. Mr. Goodwill, what is your occupation?
A. Miner.
Q. How long have you been a miner?
A. Thirty-five years.
Q. Where did you first mine?
A. Pennsylvania.
Q. Where have you mined since you left Pennsylvania?
A. Colorado.
Q. How long have you resided in Colorado?
A. Twenty-one years.
Q. What mining districts in the State of Colorado have you mined in?
A. Mostly in Lake county.
Q. How long have you been in Lake county?
A. Since 1879.
Q. Upon what properties have you been employed during the period since 1879?
A. Well, several properties; been on the Chrysolite, on the Jonny and different properties in the camp.
Q. Have you ever been employed upon properties upon Breece hill?
A. Not outside of the Ibex.
325 Q. Will you state if you were acquainted with what is known as the old Pocket Liner shaft of the Eulalie claim on Breece hill?
A. Yes, sir.
Q. Have you had occasion recently to visit that shaft?
A. Yes, sir.
Q. Have you examined the drift at the present bottom of the shaft?
A. Yes, sir.
Q. Will you state what you saw in that shaft if anything; go on and state in detail what you saw?
A. On the upper level I saw a vein.
Q. Go into the lower level; what did you see if anything in the lower level of a vein of mineral in place in that drift?
A. No, sir; I did not.
Q. I will call your attention to a map which is testified to as hav-

ing been made by Mr. Boehmer, in which and in his testimony he has stated that there are three distinct veins of ore that run in a northeast and southwest direction, and one that runs in a northwest and southwest direction; will you state if you have seen anything corresponding to what is portrayed upon that map as veins?

A. No, sir.

Q. Have you seen any slips in the rock?

A. Yes, sir.

Q. Have you ever observed those in other properties in this camp?

A. Yes, sir.

Q. Where have you seen anything of that kind?

A. You will find those slips in all this porphyry in Leadville, at least I have found it so.

Q. Do you consider those slips veins or lodes of mineral in
326 place?

A. No, sir.

Objected to as leading. Objection sustained.

Q. From your experience as a miner, Mr. Goodwill, what do you say as to the presence or existence of veins of mineral in place in that drift?

A. I wouldn't call them veins, mere slips or partings in the porphyry.

Cross-examination of Mr. GOODWILL by Mr. EWING:

Q. You say you would call them simply partings in the porphyry; where there are small partings in the porphyry the space that is made by the parting is generally filled up by some matter, are they not?

A. Yes, sir.

Q. Where it is simply a slip it is filled up by porphyry which is ground up by the slip when the slip occurred; it is filled up with such matter, is it not?

A. Yes, sir.

Q. And if this matter contained within what you choose to call a slip was quartz or iron or rock entirely different from the surrounding country rock, then it would not be simply a slip, would it?

A. No, sir.

Q. It would be a vein?

A. It would be a vein, yes, sir.

Q. As a matter of fact if the matter contained in these places you call slips were assayed and found to carry an appreciable amount of gold and silver in quartz then it would be vein matter?

A. If there was quartz and iron there I would call it vein matter.

Q. What did there occur in this drift at a distance of four feet from the shaft, from where the drift run from the shaft, what occurred there?

A. I didn't see anything at four feet that I took notice of.

Q. You didn't see anything at four feet that you took notice of?

327 A. No, sir; there was a little red-stained porphyry there.

Q. You noticed that there was something there that was red-stained and that was all?

A. Yes, sir.

Q. You didn't take it out?

A. No, sir; not at that point.

Q. Who went up there with you, Mr. Goodwill?

A. There was several up there.

Q. Was Mr. Elder with you?

A. Yes, sir.

Q. And he made the remark several times, now you can see gentlemen there is no ore in this drift, didn't he?

A. No, sir; that wouldn't cut any figure with me.

Q. Didn't he say so?

A. No, sir.

Q. You went up there as a matter of fact of not discovering a vein, did you not?

A. No, sir.

Q. Didn't he tell you that he wanted you to be a witness, didn't he tell you that he wanted you to show that there was no vein in that drift?

A. No, sir; he asked me to go and state what I saw.

Q. You have found a change in the porphyry at four feet in, something stained there so that you couldn't tell what it was?

A. It was red porphyry.

Q. You didn't pick it at all?

A. Not at that point; no, sir.

Q. Now at the point 19 feet in, what occurred there on the left-hand side of the drift?

A. There was a kind of a slip running northeast and southwest, as near as I could get at it, dipping probably about 60 degrees to the west.

Q. That seemed to be apparently a very small seam?

A. A quarter of an inch to an inch and a half.

Q. Did you find any porphyry in that streak?

328 A. No, sir; it was very soft talc.

Q. The talc on Breece hill as a matter of fact generally carries among the richest ore, does it not?

A. Yes, sir.

Q. You have worked on the Ibex, you say?

A. Yes, sir.

Q. Do you not know that the talc in the Ibex runs ten, twenty or thirty times higher than the general ore in the Ibex?

A. Yes, sir.

Q. What is marked on that map of Mr. Boehmer's, what is called the third vein, so designated here, Mr. Goodwill?

A. Yes, sir.

Q. You found another slip of the same sort there?
A. I call it a slip, yes, sir.
Q. Then you found another one which he designated number four?
A. Yes, sir.
Q. And that was curved out as a matter of fact in the end of the drift?
A. Yes, sir.
Q. Gave a curved appearance by reason of being shaped in a curved manner in the breast of the drift?
A. Yes, sir.
Q. Otherwise it was virtually a flat vein as a matter of fact?
A. Yes, sir.
Q. And that slip also seemed to have some foreign matter in it, some talc or something?
A. It was a little selvage between the seams that is all.
Q. How much did you dig in there?
A. Well, probably an inch or two inches.
Q. At one place or two places?
A. Well, I think three places.
Q. If that should carry quartz?
A. I didn't see any.
Q. I say if it should then it would not be a slip, it wou'd be a vein; in other words you don't mean to say simply because it is half an inch or two or three or four inches it would not be a
329 vein simply on account of the narrowness of the streak.
A. No, sir.
Q. In your opinion as a practical miner, a man who has been a miner for thirty or forty years, the presence of quartz there and other rock differing from the porphyry would indicate that it was a vein and not a slip?
A. Yes, sir.

J. J. GUNTHROD being called as a witness for the plaintiffs in rebuttal and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Gunthrod, where were you born?
A. Detroit, Michigan.
Q. What is your occupation?
A. At the present time mining and reporting for the Leadville Miner.
Q. What has been your occupation recently?
A. Why, that has been my occupation for the last eight or ten weeks.
Q. You have been engaged in mining?
A. Yes, sir.
Q. For how long?
A. Off and on for twenty years.

Q. State your experience in mining in different camps and places where you have mined?

A. My first mining experience was, I believe in Utah about twenty years ago as mining agent for Mr. Erastus Wyman, who at that time was a director of the Western Union Telegraph Company. I located with others——

The COURT: You need not go into this any further.

Q. Just go on and generally state your experience in what camps you were?

A. I have been in Wood River, Idaho, the Gold Brick district in Gunnison, passed a summer in the Twin Lakes country and
330 a year or so ago had a lease on the Goldsmith mine near Pitkin, etc.

Q. Are you familiar with the occurrence of veins?

A. Made a special study of occurrence of veins, ore in fissure veins, claim to be an expert on that subject.

Q. Have you reported on mining properties?

A. On several.

Q. Will you state what your experience is in California mining district, Lake county?

A. Why at different times, that is if you refer by that to the Leadville district—at different times I have visited different mines.

Q. What mines have you visited?

A. Mr. Nicholson's property A. M. W., been in the Penrose here a short time ago, I have been in the properties that the Union Leasing Company conducted some years ago, I have also been in what is now known as the Ibex group, commonly referred to as the Little Jonny, and nearly all the prominent mines.

Q. Are you acquainted with the occurrence of veins of ore in the porphyry?

A. Yes, sir; to some extent.

Q. Did you make an examination of the east drift of what is known as the Pocket Liner shaft of the Eulalie Lode mining claim?

A. That depends on what you call the east drift.

Q. The lower level of that shaft?

A. If you mean that there drift on that map, that is the one.

Q. Yes, sir; the drift portrayed on Mr. Boehmer's map?

A. Yes, sir.

Q. Go on and state what you saw in that drift, if you saw anything, vein, lode or ledge of any kind?

A. I saw nothing after leaving the shaft until I got up to
331 that vein referred to there as number three which I could call anything as a vein, unless you refer to the entire formation as an ore measure.

Q. Do you consider the occurrence of porphyry as an ore measure?

A. It might be; I don't say that in this instance it would be, because I don't know of the fact that it is ore bearing.

Q. Go on and state what appearances you found at the point called vein number three on Mr. Boehmer's map?

A. This vein here?

Q. That is supposed to be a vein?

A. There was a crack, might say, diagonally across that drift.

Q. Crack in what?

A. In porphyry.

Q. How large was it?

A. Why, at one point I presume it was all of an inch; perhaps that inch extended for about six inches; and all the other part of it I don't suppose that it averaged a half inch.

Q. What were the sides of that place?

A. The wall here had been cut out, all that out here, all along here, somewhat in here, and that side of the drift it left standing here up to the roof and down to the bottom a wall of porphyry. It also did it over here, and it was in the roof.

Q. What would you define that appearance to be?

A. Why, that appearance I would simply take as a crack with a little filling of ochre. There is a bare possibility of its being a wall to a vein, but that had not been demonstrated; that is that portion of it if you leave the crack out was a wall to a vein that had not been demonstrated.

Q. What do you state as to the occurrence or presence of a
332 vein of mineral bearing gold and silver in rock in place in that total length of that drift; does any occur or not?

A. I don't know as I could get the question.

Q. What do you say as to the occurrence in that drift as you examined the same of a vein or lode of mineral in place?

A. I wouldn't say that it had been demonstrated.

Q. From your experience is there a vein or lode of mineral in place at any one of the points designated as vein number one, vein number two, vein number three or vein number four?

A. I say there is none, except there is the possibility of there being a vein there, but the vein has not been demonstrated.

Cross-examination by Mr. CAVENDER:

Q. Were you asked by Mr. Elder to go there for the purpose of being a witness?

A. I was asked to go there and see what there was to see in the way of a permanent ore vein.

Q. Did you go there with Mr. Goodwill?

A. I don't known whether Mr. Goodwill was present or not. There were several people, I didn't know who they were until afterwards I got introduced to some of them.

Q. You searched this thoroughly from one end to the other?

A. Pretty thoroughly, yes, sir.

Q. To find if there were veins or slips or whatever they were?

A. Yes, sir.

Q. You looked at every slip as well as every vein?

A. Yes, sir.

Q. Do you know whether you were there with Mr. Goodwill or not?

A. I don't know whether Mr. Goodwill was present or not. The gentlemen was all strangers except Mr. Elder. There was six or eight.

333 Q. You couldn't discover a vein or slip or crack coming in at number two?

A. I remember something about a crack up there.

Q. Did you examine it?

A. Yes, sir.

Q. Did it have the same characteristics, the same shape as this?

A. Why, I never measured it.

Q. Why did you say you couldn't discover anything from the shaft until you got to number three?

A. I said I couldn't discover anything that resembled a vein.

Q. You say number three does?

A. No, except this portion of that drift, rock in that drift; I don't say what is represented as number three, I don't say it is a vein.

Q. Do you say it is not?

A. I don't say that it is not.

Q. You don't say that it is not; can you say that that entire drift is not run on a vein?

A. Yes, sir.

Q. What are the walls of that drift?

A. Porphyry.

Q. Was there not a well developed wall on this side?

A. No, sir.

Q. Clear wall?

A. No, not all the way.

Q. Nor on this side?

A. No, sir.

Q. How far is it a plain developed wall?

A. It is only in portions; sometimes it is cut out, seemed to go on a vein in the drift here; the men who worked the mine made it so clean and nice that it appeared as a wall, but it was not a true wall.

Q. So you think in shooting out the porphyry the miners in running this drift succeeded in getting in their shots so well and sandpapered it so well afterwards, that that side down there which is now so smooth as to resemble a wall, they shot out that way?

A. No, sir; I don't mean to say anything of the kind.

334 Q. How do you think the smoothness appears there?

A. That they done it with a pick. The rock seems to be block porphyry which would represent a smooth plane.

Q. Do you mean to say as an expert that a man can go in and pick out porphyry and make cleavages, make it so it will have a smooth wall of a porphyry vein?

A. No, I don't say that; I do say they can work a pretty smooth wall with a pick.

Q. Are you prepared to say, Mr. Gunthrod, that that entire porphyry deposit as developed in that drift is not an ore measure?

A. I am prepared to say that there is a possibility of the entire porphyry being an ore measure.

Q. Are you prepared to say that it is not an ore measure?

A. No, sir.

Q. Now then you say that all you could find, if I understand it, was in this vein?

A. No, sir; I didn't say anything of the kind.

Q. You testified to ochre being in that vein?

A. Yes, sir; I testified that there was ochre there.

Q. What did you find in this vein?

A. Ochre.

Q. What did you find in that vein?

A. Ochre.

Q. Do you mean by that talc?

A. No, sir.

Q. What do you mean?

A. By ochre I mean an oxidized form of iron, any mineral of that kind in compact shape.

Q. It was iron then?

A. I presume it was iron from the looks of it. I made no test, might be lead, might have been brown oxide of copper.

Q. I was going to ask you from your knowledge of Breece Hill formation the ore measures upon that hill, do you not know
335 that if the iron is found in the, as you call it, seams or cracks that clay that the veins carry gold and silver?

A. I cannot say that all the ochre does; I know ochre usually does though.

Q. Doesn't it so far as your experience goes, doesn't ochre carry gold and silver?

A. I have seen ochre that did not.

Q. I am speaking of your own knowledge?

A. I can't say of my own knowledge, I have made no tests.

Q. Those that you tested always carried gold and silver?

A. I have got those in which the assayers gave a trace of gold and silver.

Q. They all carried mineral?

A. Yes, sir.

PETER TURNBULL being called as a witness for the plaintiffs in rebuttal and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Turnbull, where were you born?

A. I was born in Lower Canada.

Q. How long have you resided in Colorado?

A. A little over twenty years.
Q. How long have you resided in Leadville?
A. Same length of time.
Q. What business have you pursued?
A. Mining.
Q. What parts of the California mining district have you mined in?
A. Why, all over it nearly.
Q. Have you done any mining upon Breece hill?
A. Yes, sir.
Q. In what properties have you mined upon Breece hill?
A. I have mined on the Ballard, on the Peggy McCullum and the J. G. Fractions.
336 Q. What mines have you mined in on Carbonate hill?
A. On the Morning Star, the Waterloo, Maid of Erin and nearly all the carbonate mines.
Q. What on Fryer hill?
A. What is known as the O. K. and some others, the Lee.
Q. What mines on Iron hill, if any?
A. Why, I guess all I done on Iron hill was to sink a shaft, I forget the name of the claim, somewhere below the Bullseye.
Q. Do you know what has been called in this case the Pocket Liner shaft of the Eulalia Lode mining claim?
A. Why, I visited the shaft a few days ago, up there they said was the Pocket Liner shaft of the Eulalie claim.
Q. Did you go down that shaft to the lowest level in the shaft?
A. Yes, sir.
Q. What did you see or discover if anything in the nature of a vein or lode of mineral in rock in place in that drift, if anything?
A. Well, from what I know of Breece hill I would say that in that drift from the shaft to the face that the drift is run entirely in the gray porphyry, in places heavily stained with iron, a red iron stained porphyry; and in various places in that drift there is slips and partings in this porphyry. While I didn't take the time to examine it as thoroughly possibly as I ought to, there looked to be so little there in the shape of a vein that I might have overlooked possibly a vein, but as far as I saw I wouldn't say that there was a vein in that drift.
Q. You speak of slips in the porphyry; have you ever seen any slips in the porphyry on other parts of that hill?
A. Yes, sir.
337 Q. Where?
A. In the Peggy McCullum specially.
Q. Are they matter of frequent occurrence?
A. Very.
Q. Was it an unusual thing in 43 feet to find five or six or seven of those slips?
A. No, sir; or twenty.
Q. Twenty of those slips?

A. Yes, sir.
Q. What was the nature of the work that you carried on in the Peggy McCullum?
A. Sinking and drifting.
Q. Did you have any drifts similar to the drifts you examined in the Pocket Liner shaft in the Peggy McCullum?

Objected to by defendant as incompetent and immaterial.
Objection sustained.
To which ruling of the court plaintiffs duly excepted.

Q. Where is the Peggy McCullum?
Q. I will ask you, Mr. Turnbull, if you are acquainted with that fact, how far the Peggy McCullum claim would be from the Eulalie claim?
A. Well, I have got no way of knowing only by guessing.

The COURT: Give your best judgment.

A. I would say from fifteen hundred to two thousand feet.
Q. Will you state if the slips or gashes in the poryphry in the east drift of the Pocket Liner shaft are similar to the gashes and seams and slips found in the drifting of the Peggy McCullum?
A. We have similar slips.
Q. Any of them larger or smaller than these slips?
A. Yes, sir; I have had them as high as—filled with——
Q. Go on and state?
A. Well, yes.
Q. How large have they been?

338 The COURT: This is not rebuttal; there is no evidence in chief as to anything in the Peggy McCullum.
Q. Then I will ask you the general question, Mr. Turnbull, do you consider that in that east drift from the Pocket Liner shaft there is a vein or lode of mineral in place, as you examined it?
A. Not according to my idea of a vein.

Cross examination of Mr. TURNBULL by Mr. CAVENDER:

Q. Mr. Turnbull, the Peggy McCullum is on the west slope of Breece hill, is it not?
A. Yes, sir.
Q. Near the valley?
A. Yes, it is within 150 or 200 feet of it.
Q. So is this other you speak of?
A. Yes, sir.
Q. So that the three properties you have worked in on Breece hill are as a matter of fact upon the west slope over the brow of the hill?
A. On the west slope.
Q. And that from your knowledge, from your information you

know the formation is somewhat different upon that side of the hill than it is on the other, do you not?

A. Why, the prophyry is the same evidently, looks the same.

Q. Yes, but I mean in the occurrence of the mineral; doesn't it occur differently in the Ibex?

A. I don't know how it occurs there.

Q. As a matter of fact you don't know how the mineral occurs in the Ibex or the other mines on the eastern slope of Breece hill?

A. No, sir.

Q. Now you spoke about these being slips or cracks in the porphyry and being small slips or cracks that therefore they are not veins; what is a fissure vein?

A. Well, I have heard so many definitions to a fissure vein that I don't know that I could explain.

Q. I am not asking for a scientific definition; is not a fis-
339 sure vein simply a crack which is filled with mineral matter?

A. Yes, sir.

Q. A crack in the granite then may fill with mineral matter?

A. Yes, sir.

Q. Now then just the difference between a slip and a vein, the difference consists in what the filling of that vein is, is it not?

A. Yes.

Q. So that if the crack or the slip as you choose to term it, even if it is only an eighth of an inch or a sixteenth of an inch in width, if it was filled with different matter from the country rock, or the wall rock as we call it, filled with matter which contained gold and silver or lead or cinnabar, it would be a vein would it not?

A. It would provided it carried its course. But the reason I say that I don't think that in my judgment there is any vein there is because you see slips in that porphyry every foot you go in that porphyry, nearly every half foot I will say they are cutting off that way and cutting off that way and they are cutting off under, there is nothing regular to them.

Q. Certainly, but you discovered, did you not, a continuous, either vein or slip, call it either way for courtesy, which run from this side of this drift and showed in the roof and in the bottom and came across here and came out again here and came up to this point, and that was continuous, was it not?

A. Yes, but it was a little crack filled with mud, that was not wider, on this side of the drift it was not wider than my finger.

Q. Wider on the other side?

A. A little bit.

Q. You say that was filled with mud?

A. Yes.

340 —. Well, by mud do you mean the common acceptation of mud on the street, or do you mean ochre or talc?

A. I would say that it was simply deposited there by water.

Q. How much did you dig into it?

A. Oh, I had a little pick in my hand, one of these little hand picks.

Q. Prospecting pick?

A. Yes; I picked in an inch or two in different places.

Q. That is all along the drift?

A. Yes, I used the pick all along the drift.

Q. Did you discover this vein or slip at this point?

A. Well, now, I didn't follow that clear along; I noticed in one point about half way between this——

Q. About there?

A. About there I noticed a nice smooth slip there.

Q. And that seemed to be continuous so far as you could see?

A. Up and down, yes.

Q. Up and down you could see it there on top, couldn't you?

A. It went up to the top.

Q. Did you discover this one?

A. I discovered that; yes, sir.

Q. That is the one that is shaped out in the shape of an arc, circular here?

A. Yes, sir.

Q. That is somewhat larger than the other, is it not?

A. Very little in places.

Q. Well, when you strike a vein, never mind whether it is an inch or a foot or twenty feet as an average width you don't expect the vein to be regular, do you?

A. Oh, no.

Q. If in that vein there were found quartz and iron and
341 ochre that would be different from the country rock, would it not?

A. I didn't find it.

Q. No, but I say if that was a vein there it would be different from the country rock?

A. Certainly.

Q. And would constitute vein matter?

A. Why, yes, iron.

Q. What do you call it?

A. Mineralized form of vein matter.

Q. If in addition the quartz, ochre and iron should assay, some of it seven ounces in silver and a fraction in gold, and some of it should assay a smaller fraction in silver and a larger fraction in gold, say .13 and .17 ounces, then you would say it was a very appreciable quantity of mineral, would you not?

A. I get those kind of assays all over Breece hill.

Q. As a matter of fact working in this Ballard mine you speak of you have followed streaks in that an inch, an inch and a half and two inches in thickness, have you not?

A. No, sir.

Q. Then you don't know in practice but what in following those streaks upon that hill it is possible to come into large bodies of ore?

A. My experience is any place a man digs he is liable to get ore in Leadville.

Q. But you don't know from your own experience that a man would not be likely to run into a large body of ore by following one of these streaks?

A. If they don't cut off; they seem to cut off.

Q. Here are two you have discovered running clear across?

A. No, that one don't go clear across.

Q. Not across the drift, but it went out of sight here?

A. Yes.

Q. And it went out of sight there?

342 A. This vein here lays on a hump like that, comes into the drift, the drift comes in here, now it lies down there to the south, and it comes in here to the north, northerly direction; now this vein connects about three feet from the ground with this one, three feet from the bottom of the drift, but it does not—it goes out in there in porphyry at the bottom of the drift.

Q. But you don't know how far it continues in this direction?

A. No.

Q. Nor in this direction?

A. There is no drift.

Q. You don't know that it ever does stop?

A. No, sir.

Q. To the center of the earth?

A. No, sir.

Q. So far as it appears it is a continuous slip?

A. I can't see any further than the drift goes.

Q. Now you spoke also about your idea of a vein; wasn't your idea largely formed on the idea of the shaft vein?

A. Oh no, I have worked all kinds of veins, most of them were not shafts.

Q. Now do you agree with Mr. Gunthrod that that is probably a vein, vein matter, in the end of the drift, and that this in here is a wall of a vein?

A. No, I can't agree with anybody. I don't think that that is a vein in any part of that drift any more than porphyry is a vein.

Q. You found the wall all along?

A. You find slips all along.

Q. I meant the wall of that main vein?

A. There is a smooth slip there.

Q. The entire distance isn't it?

A. No, not the entire distance, a little ways, I didn't use any measurements.

Q. Don't you think, Mr. Turnbull that the entire porphyry

343 in the top of that drift is a changed porphyry from that that is in the wall, has more iron in it, more ochre, a metamorphosed porphyry you might call it in that distance enclosed in the walls, about four feet wide?

A. With the exception of some red iron stain in the porphyry I can't see anything to indicate a vein any place in that drift.

Q. In your opinion you couldn't find a vein there, but if these conditions exist, quartz, etc. that is found there, that would make a vein?

A. Well, I didn't find any quartz.

Q. You did not.

A. No.

—— ALEXANDER called as a witness for the plaintiffs in rebuttal.

The COURT: You have already put upon the stand four witnesses to rebut the existence of any vein within what has been referred to as the east drift and marked upon the map as running southeasterly from the shaft.

Mr. ELDER: We except to the ruling of the court in confining us to the evidence of the four witnesses already sworn upon the existence of a vein in the east drift.

We would now like to ask permission of the court to prove the shipment of ore on the east side of the Eulalie claim.

The COURT: That is not rebuttal.

Mr. ELDER: That is part of my own case after we have established the fact that they haven't any vein in that place.

344 The COURT: If you have any rebuttal you may proceed.

WILLIAM CARSON being called as a witness for the plaintiffs in rebuttal, and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Mr. Carson, how long have you resided in Lake county?

A. Sixteen years.

The COURT: Tell us what you intend to rebut by this witness.

Mr. ELDER: We intend to prove that the 65 feet of timbering that exists in what has been called the Pocket Liner shaft or the Golden Rod shaft is not equal in value to $500, which is the amount of the total five years' annual assessment work. We want to prove by this witness that ten feet of timbering in a shaft of that kind is not worth one hundred dollars.

The COURT: The Government of the United States may claim that but you cannot until you establish a valid location, which you have not done. We cannot allow this witness to testify to anything of that kind.

Plaintiffs object and except to the refusal of the court to allow plaintiffs to establish the fact of abandonment and forfeiture.

The COURT: You have not offered proof of abandonment, you

have not offered to prove by this witness forfeiture; you are offering to prove by this witness that certain work was not done and you are going to prove it by proving that 65 feet of work has been done and that it is not worth $500. You are not in position to introduce
345 proof upon that point.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

SAMUEL MCMILLEN being called as a witness for the plaintiffs in rebuttal and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

The COURT: Now make your statement as to what rebuttal you intend to make by this witness.

Mr. ELDER: We desire to rebut the testimony of Mr. Charles T. Limberg with reference to his not having notice of the location of the Eulalie Lode mining claim before the making of his location.

Mr. CAVENDER: We object to it as immaterial and incompetent and not tending to establish any issue in the case, it not being shown that the Eulalie claim ever had any title.

The COURT: You may introduce proof as to the notice, not as to the shipment of ore, just to rebut Mr. Limberg.

Q. Mr. McMillen, will you state if you were one of the locators and owners of the Eulalie Lode mining claim?

A. I am and was.

Q. Will you state if in January, 1894, you had any conversation with Mr. Limberg with reference to your claim upon the
346 ground of the Golden Rod claimed by him?

A. Yes, sir.

Q. State when it was?

A. Just the exact date I can't give it, but I went on the hill and found where they had surveyed and had a little hole down about four feet, and I came back and notified Mr. Limberg for to stop work, that that was my property. I was a little bit wrathy about it and I notified him to go on the hill and I would hire the best rig in town and we would settle it there.

Q. Will you state if prior to that time you gave that notice to Mr. Limberg that you had been upon the hill and notified certain parties working upon the Pocket Liner shaft?

Objected to by defendant as not rebuttal.

The COURT: You are proceeding to introduce evidence with regard to another notice to another party.

Mr. ELDER: We cross examined Mr. Limberg whether he had received notice through Thomas Walsh that Mr. McMillen claimed that property and he said that he did not.

Mr. CAVENDER: He said that he never received any such notice prior to the location of the claim, and Mr. McMillen testified himself to that, that it was before the stakes were set and the shaft begun.

THOMAS WALSH being called as a witness for the plaintiffs in rebuttal and duly sworn, testified as follows:

Direct examination by Mr. ELDER:

Q. Will you state if at any time prior to the location of the Golden Rod Lode mining claim Mr. McMillen notified you of a claim he had upon that property?

347 Objected to as not rebuttal; this is not to Mr. Limberg or any defendant in this case.

The COURT: He proposes to follow it up by showing that the witness told Mr. Limberg.

Q. Go on and state, Mr. Walsh, if at any time prior to the location of the Golden Rod Lode mining claim Mr. McMillen notified you at the Pocket Liner shaft not to do any work there and that he claimed that ground?

A. Yes, sir.

Q. How soon thereafter did you convey that notice, did you convey to Mr. Charles T. Limberg that notice?

A. I think the next day, next morning.

Q. What did you state to Mr. Limberg, what was the language used?

A. I told him that Sam claimed that property.

Q. What was Mr. Limberg's reply?

A. I don't know, I kind of think he said, Go ahead, Sam is crazy and claims the whole hill, something like that.

Q. Were you at this time working upon the shaft of the Pocket Liner?

A. Yes, sir.

Q. Was this prior to the location of the Golden Rod claim?

Objected to as leading.

The COURT: Say when it was.

Q. When was it as compared to the time when they went to work on that shaft?

A. Which?

Q. When was it that this notice came to you from Mr. McMillen, what time?

A. I think about two or three days before Sam came up.

The COURT: Two or three days before what?

A. We were working two or three days before Sam came up

348 Q. When was it Mr. McMillen gave you the notice?

A. It was two or three days after we went to work there.

Q. Went to work where?

A. On the shaft; it was either the second or third day.

Q. Was this before or after you had received the lease on the Golden Rod mining claim?

A. It was before.

Q. And before the location of the Golden Rod?

The COURT: That is the same question Mr. Cavender objected to; you must prove the date.

Q. For the purpose of refreshing the memory of the witness I hand him a paper and ask him on what date he went to work upon the shaft of the old Pocket Liner shaft in January, 1894?

A. I went to work on Monday.

Q. Monday, what was the date?

A. I can't tell; I don't remember the date.

Q. Look at the calendar for the year 1894?

A. I don't know; I know we got the lease and went to work on Monday morning.

Q. How soon did you go to work after receiving this paper?

A. Which, the first lease?

Q. The lease from the Golden Eagle Mining Company?

A. Well, I guess we got that Thursday or Friday and went to work on Monday.

Mr. CAVENDER: I want to know whether it was the Monday after getting the lease or before that he went to work.

A. It was the Monday after we got the lease.

Q. What was the date of the lease?

Mr. CAVENDER: The 19th day of January is the date of the lease.

349 Mr. ELDER: If Mr. Cavender will look at the calendar we can agree what day the 19th was, which was Friday.

Mr. CAVENDER: I have no idea the lease was executed on the 19th day of January, that is the day the lease was drawn up. The lease is dated the 19th, I haven't the slightest idea whether the lease is dated on the day of its date, it is an impossibility.

Q. You went to work on Monday succeeding the Friday the 19th day of January?

A. Yes, sir.

Q. That would be the 22d day of January?

A. 22nd day.

Q. Now how soon thereafter did Mr. McMillen notify you that you were working upon his ground?

A. I think the third day, second or third, I can't remember which one of the two.

Q. Either Tuesday or Wednesday?

The COURT: That would be either the 24th or 25th?

Mr. ELDER: I would like to ask Mr. McMillen if he gave that notice.

The COURT: I don't think they will deny it.

Mr. CAVENDER: No, we don't know anything about it, it is simply immaterial.

Mr. ELDER: Do I understand the court to hold that we have no such location as allows us to introduce documentary evidence, has there been no change in the idea the court takes on the legal question?

The COURT: Not the slightest.

Plaintiffs rest their case in rebuttal.

Plaintiffs request that the jury be taken to the premises
350 and given an opportunity to examine the shaft and drifts.

But the court refused to grant said request and to send the jury to the premises in dispute.

To which ruling of the court plaintiffs by their counsel then and there duly excepted.

And the above and foregoing was all of the testimony adduced on the part of either the plaintiffs or defendant upon the trial of said cause.

Thereupon the plaintiffs asked the court to give to the jury the following instructions:

But the court refused to give said instructions. To which refusal of the court to give said instructions and each and every thereof the plaintiffs by their counsel then and there duly objected and excepted.

Thereupon the court instructed the jury as follows:

To the giving of said instructions and each and every thereof plaintiffs by their counsel then and there duly objected and excepted.

351 Thereupon the jury returned a verdict in favor of the defendant and against the plaintiffs.

To which said verdict plaintiffs duly objected and excepted.

Thereupon the court rendered judgment upon said verdict in favor of said defendant and against said plaintiffs.

To which judgment plaintiffs by their counsel then and there duly objected and excepted.

Approved, April 7, 1900.

JOHN A. EWING,
CHARLES CAVENDER,
Att'ys for Def't.

And forasmuch as the matters above set forth do not fully appear of record, the plaintiffs tender this their bill of exceptions and pray that the same may be signed and sealed by the judge of this court and made a part of the record in this action pursuant to the statutes in such case made and provided, which is accordingly done on this 7th day of April, 1900.

FRANK W. OWERS, [SEAL.]
District Judge.

Tendered to me this — day of March, 1900.

—— ——, *Judge.*

Which said bill of exceptions is in words and figures as follows, to-wit:

352 In the Supreme Court of the State of Colorado.

SAMUEL McMILLEN, RONALD MORRISON, and EBEN SMITH, Appellants,
vs.
THE FERRUM MINING COMPANY, Appellee.

Appeal from the district court of the county of Lake, State of Colorado.

Assignment of Errors.

Now come the appellants by George R. Elder their attorney and for assignment of errors herein say that in the record and proceedings in said cause the district court of the fifth judicial district in and for the county of Lake and State of Colorado committed manifest error to the injury of these appellants, in the following particulars in this, to-wit:

1. That the court erred in refusing to allow plaintiffs to prove by Thomas H. Thompson, the discovery and existence of a vein of gold and silver bearing ore in rock in place in the Pocket Liner shaft within the limits of the Eulalia Lode mining claim prior to the location, staking and survey of the Eulalia lode claim, and that Samuel McMillen one of the appellants, and plaintiffs below was one of the owners of the Pocket Liner lode claim at the time of such discovery and disclosure of said vein; and knew and claimed at the time of the location and staking of the Eulalia lode claim of the discovery and existence of a vein of gold and silver bearing ore in the Pocket Liner shaft within the limits of his location — the Eulalia Lode mining claim.

353 2. That the court erred in refusing to allow plaintiffs to prove by witnesses M. M. McInnis and W. L. G. Smith the discovery and existence of a vein and body of gold and silver bearing ore opened by them; and from which vein and lode quantities of such ore were mined, shipped and sold by them to the Union Smelting Company; such work being done by the plaintiffs in this action through the workings of the Little Vinnie lode claim from the three hundred eighty (380) foot level of the Little Vinnie shaft and while said property was under lease to some of these appellants.

3. The court erred in refusing to admit in evidence in behalf of plaintiffs, smelter settlements, books of original entry of the Union Smelting Company, original receipts, checks, check stubs, control assays, bank deposit books, bank balance books and daily bank deposit books, checks and receipted bills of ore samplers, and scale weight bills—as documentary evidence of ore shipments and actual

proof of the men in charge of the work of taking the ore from the vein within the south east fraction of the Eulalia lode, and shipping the same to the smelter.

4. The court erred in refusing to allow plaintiffs to prove what they discovered; opened and disclosed by their work done in the south east Eulalia fraction from the three hundred eighty (380) foot level of the Little Vinnie claim, and which was shown in the stopes above their drift driven into their Eulalia claim.

5. The court erred in holding that the United States statutes and the statutes of Colorado required plaintiffs to show an opening or openings within the lines of their Eulalia claim from any vein, lode or ledge discovered by them within the limits of their Eulalia claim to the surface of the earth; before plaintiffs could claim and

354 prove a discovery of such vein, lode or ledge from by or through workings having their only openings on territory outside the limits of their Eulalia lode claim.

6. That the court erred in holding that plaintiffs were prohibited by the injunction issued in the case of The Ferrum Mining Company *vs.* Samuel McMillen, Ronald Morrison and John McCombe a proceeding under section 159 of the Code of Colorado, from working in and upon the Pocket Liner shaft, and introducing evidence as to the vein discovered and disclosed in the north drift from said shaft while performing their annual assessment work for the years 1895, 1898 and 1899, the said premises being within the lines of their Eulalia Lode mining claim and a part and portion of the ground in controversy in this action, and being in the peaceful possession of the plaintiffs herein.

7. That the court erred in holding and assuming to hold that it had the power under section 159 of the code of procedure to issue a writ of restitution and injunction in an interlocutory proceeding to prohibit and restrain plaintiffs from working in and upon any part of the property claimed by them as the Eulalia lode in the absence of defendant company or its agents and while not in the actual physical possession of the defendant company, and it was palpable error to refuse plaintiffs the right to prove by plaintiffs' witness J. J. Green what material, vein matter or lode material was found by plaintiffs in their peaceful and undisturbed work from the one hundred thirteen (113) foot level of what is called the Pocket Liner shaft.

355 8. The court erred in permitting defendants to introduce evidence of their Golden Rod location before proving that the ground contained in said location was vacant, unoccupied and unappropriated mineral land of the United States as alleged in their answer and cross complaint; and the court erred in allowing any evidence of defendant's location or discovery of their Golden Rod claim to be submitted to the jury in the absence of proof that said ground was vacant and unappropriated.

9. The court erred in allowing defendants to introduce in evidence the lease of Charles T. Limberg and Robert B. Estey of date Jan-

uary 30th, 1894 to Charles Slavin and Thomas Walsh—made before such discovery and location of the Golden Rod lode claim as is required under the statutes to vest a valid title in them.

10. The court erred in permitting the evidence of John King and Eugene Stevens relating to material taken from a point in the south east level six (6) feet from the shaft at the one hundred thirty-five (135) foot level of the Pocket Liner shaft and the assay value thereof to go to the jury—without making proof that said material came from a vein, lode or ledge of mineral; and the error is manifest in this that all of the other witnesses of the defendant disprove the existence of any vein at all six (6) feet from said shaft at the point indicated by witness John King.

11. The court erred in refusing to allow plaintiffs to cross-examine Charles Slavin defendant's witness and lessee upon the work done by him in the south east drift of the Pocket Liner shaft and what he found in said drift although directly interrogated by defendants as to work in that drift in their direct examination;
356 and requiring plaintiffs to make the said Slavin their own witness, and compelling plaintiffs to count the said Slavin as one of their four rebutting witnesses of plaintiffs as to the south east drift, all over the exception and objection of plaintiffs.

12. The court erred in refusing to allow plaintiffs to cross-examine defendants' witnesses Boehmer, Mudd, Curley and McDonald as to the presence of the veins they testified to in the south east drift appearing in their course in the north east drift fifteen (15) feet above the south east drift, and forcing plaintiffs to make Mr. Boehmer their own witness as to the north east drift; the error being especially manifest when the courses given for each of the veins testified to by these witnesses would carry those veins directly across said north east drift—if they were veins at all.

13. The court erred in permitting defendants to introduce in evidence their amended and additional location certificate changing their discovery shaft from a point three hundred seventy five (375) feet from their east end line to a point over one thousand (1000) feet west of their first discovery shaft, the date of the change being March 8th, 1895, and no proof being submitted of the placing of a new discovery notice at this new discovery shaft.

14. The court erred in limiting the number of witnesses of plaintiff- in rebuttal to four over plaintiffs' exception and objection, and by refusing to permit proper cross-examination of defendant's witness Charles Slavin, further confining and limiting plaintiffs' witnesses in rebuttal to four.

15. The court erred in refusing and declining the request and application of plaintiffs to send the jury impaneled in the case in a body to view and inspect the premises—as provided by sec-
357 tion 188 A of the code of procedure against plaintiffs' objection and exception saved.

16. The court erred in refusing instructions numbered 1, 2, 3, 4,

5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 asked by plaintiffs against plaintiffs' exception saved.

17. The court erred in refusing to instruct the jury on request of plaintiffs.

Instruction No. two as follows:

The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location.

It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein, or lode within the limits of his location but it must be known to him and claimed by him, in order to give validity to the location.

18. The court erred in refusing to instruct the jury on request of plaintiffs.

Instruction No. three as follows:

The court instructs the jury that the essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode or ledge of mineral bearing rock in place and if the relocator finds such vein in the discovery shaft of the abandoned claim, he may under our statute, make a valid relocation thereon; though such finding is not a disclosure of something that "existed before but remained unknown," and therefore, technically, perhaps, does not constitute a discovery.

358 19. The court erred in refusing to instruct the jury on request of plaintiffs.

Instruction No. four as follows:

The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made of the existence of mineral.

And under section 2320 Revised Statutes of the United States the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location even though the discovery was first made by some one other than the locator.

20. The court erred in refusing to instruct the jury on request of plaintiffs.

Instruction No. five as follows:

The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location.

It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a

vein, or lode within the limits of his location but it must be known to him and claimed by him, in order to give validity to the location.

359 21. The court erred in refusing to instruct the jury on request of plaintiffs:

Instruction No. six as follows:

The jury are instructed that the following provisions of the statutes of Colorado must be substantially complied with in the relocation either in part or in whole of abandoned lode claims.

The re-location of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the re-locater may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case, a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property.

22. The court erred in refusing to instruct the jury on request of plaintiffs.

Instruction No. seven as follows:

You are further instructed by the court that only the unoccupied and unappropriated mineral lands of the public domain are subject to exploration and location. When one has discovered a vein and has fully complied with the law in locating and recording a claim thereon, the territory included within his surface boundaries is segregated from the public domain in so far as all parties except the Government are concerned. The locator is entitled to the exclusive possession and enjoyment thereof until it is forfeited or abandoned, the prospector cannot go within such surface boundaries to

360 prospect for mineral veins and his act if he do so is as much a trespass as though the ground were patented. To make a valid location the prospector must discover a vein or lode or deposit upon the unoccupied and unappropriated public domain. He must then perform certain acts, among which is the sinking of his discovery shaft within the limits of the territory which he has a right to appropriate. He cannot be allowed to sink such shaft upon ground embraced within a prior valid and subsisting location.

23. The court erred in refusing to instruct the jury on request of plaintiffs.

Instruction No. eight as follows:

The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January, A. D. 1894, the plaintiffs or their grantors were in the quiet and undisputed possession of the premises designated in the complaint as the "Eulalia lode" claimed by the defendant as the "Golden Rod lode," that upon May 30th, 1893, long prior to said 25th day of January, A. D. 1894, plaintiffs or their grantors posted on the surface a plain sign

or notice containing the name the Eulalia lode, the name John Kennedy the locator and the 30th day of May, 1893, the date of location; that the plaintiffs or their grantors so marked the boundaries of said Eulalia load claim by the erection of six substantial stakes hewed or marked on the sides in toward the claim and sunk in the ground; one at each corner and one at the center of each side line so as to be readily traced, and that on or about June 17th, 1893, and within ninety days of said 30th day of May, A. D. 1893, the said plaintiffs duly recorded a location certificate containing the name of the
361 lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of dis-dovery shaft the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface; and that theretofore, there had been discovered within said boundaries a vein or lode of quartz or other rock in place bearing gold, silver or other precious metals; then this constitutes a *prima facie* case for the plaintiffs which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture and the acquisition of a better right or title by the defendant and its grantors.

24. The court erred in refusing to instruct the jury on request of plaintiffs.

Instruction No. nine as follows:

The court instructs the jury that if they believe from the evidence that no lode, ledge or vein of quartz or other rock in place bearing gold, silver or other precious metals had been disclosed and discovered in the discovery shaft of the Eulalia lode or in the shaft known as the Pocket Liner shaft prior to the location of the Eulalia lode upon the 30th day of May, 1893, either by the plaintiffs herein, their grantors or some of them, or by third parties with the knowledge of such discovery by plaintiffs herein their grantors or some of them, and if they believe further from the evidence that no lode, ledge or vein of quartz or other rock in place bearing gold, silver or other precious metals had been disclosed and discovered in the Golden Rod
362 discovery shaft or in the shaft known as the Pocket Liner shaft by the defendant or its grantors and if the jury believe from the evidence that the plaintiffs herein their grantors or some of them discovered a vein lode or ledge of quartz or other rock in place bearing gold silver or other precious metals at a depth greater than ten feet below the surface of the earth in the part or portion of said premises as designated by them as the southeast Eulalia Fraction prior to any other discovery by defendant or its grantors; you are instructed that such discovery by plaintiffs relates back to the time of the original survey and location of the said Eulalia lode and enables the plaintiffs and their grantors to hold the claim against all who had not acquired interests in the lode and premises at the time the acts were performed and your verdict will then be for the plaintiffs.

25. The court erred in refusing to instruct the jury on request of plaintiffs.

Instruction No. thirteen as follows:

The court instructs the jury that under Revised Statutes of the United States, sec. 2322 vesting in the locator of a mining claim the exclusive right to its possession, a location of a mining claim may be made by one person in the name of another.

26. The court erred in giving instruction No. 4 to the jury as asked by defendants against the exception of plaintiffs, as follows:

"You are further instructed that if you find that, on or about the 10th day of March, A. D. 1894, or prior thereto, the defendant or its grantors or the lessees of its grantors, did discover a vein or lode of mineral in rock in place within the boundaries of the Golden Rod Lode mining claim, and that the defendant or its grantors complied with the requirements of the laws as to staking said Golden Rod lode claim and recorded a location certificate within the time
363 required by law, then you will find for the defendant."

27. The court erred in giving instruction No. 5 to the jury as asked by defendants against the exception of plaintiffs as follows:

"The court instructs the jury that any acts done by the lessees in the way of opening or disclosing a vein or lode, enures to the benefit of the lessors, and in this case if the jury find that the lessees of the defendants during the year 1894 discovered a vein of mineral in rock in place, such a discovery enures to the benefit of the defendants and validates their location."

28. The court erred in giving instruction No. 6 to the jury as asked by defendants against the exception of plaintiffs as follows:

"The court further instructs the jury that under the pleadings, and evidence introduced in this cause, the plaintiff- can not recover and the sole issue presented to the jury, is as to whether the defendant or its grantors have made a valid discovery and location upon the Golden Rod claim and performed the necessary work thereon.

If the jury believe from the evidence that a valid discovery and location of a mining claim was made by the owners of the Golden Rod claim, and that one hundred ($100.00) dollars' worth of work was done thereon, during the year 1899, then you will find for the defendant."

29. The court erred in not allowing George Holland, witness for plaintiffs to answer the following question:

Q. "When you were at the Pocket Liner shaft was there anything said by any of the parties present specially Mr. McMillen one of your employers, as to the presence of mineral in that shaft?"

364 30. The court erred in not allowing M. M. McGinnis witness for plaintiffs to answer the following question:

Q. "Did you see any ore on the line of the Eulalia lode, common line of the Little Winnie and the Eulalia lode."

31. The court erred in not allowing Thomas H. Thompson witness for plaintiffs to answer the following question:

Q. "Will you state what you found in that shaft in the year 1879?

32. The court erred in not allowing John J. Green witness for plaintiffs to answer the following questions:—

Q. "What kind of material or rock did you work in?"

Q. "What kind of material did you take out of that shaft at the period you worked there in driving that drift?"

Q. "Did you see a vein, lode or ledge of mineral rock in place and did you work upon the vein of mineral bearing precious metals in the course of that work?"

Q. "If this work in the drift was done upon a vein, lode or ledge in what direction did this vein, lode or ledge dip?"

33. The court erred in not allowing Stephen Connors witness for plaintiffs to answer the following question:

Q. "Will you state if you remember what were the contents, not the number of ounces; will you state whether that assay showed the presence of gold and silver within that rock that you gave to the assayer?"

34. That the court erred in entering judgment for the defendant.

365 Wherefore these plaintiffs pray that for said errors, such judgment may be reversed and remanded with instructions to the court below to grant a new trial.

GEORGE R. ELDER,
Attorney for Plaintiffs.

Leadville, April 7, 1900.

(Endorsed:) No. — In the supreme court of Colorado. Sam'l McMillen *et al.*, appellants *vs.* The Ferrum Mining Co., appellee. Assignment of errors. George R. Elder, att'y for appellants.

(Endorsement of entire transcript:) No. 4215. In supreme court State of Colorado. Sam'l McMillen *et al.*, app'nts *vs.* The Ferrum Mining Co., appellee. Transcript of record, bill of exceptions and assignment of errors. Filed in supreme court this 9th day of April, 1900, H. G. Clark, clerk.

And thereafter, on to-wit the 6th day of October, 1902, the supreme court of the State of Colorado entered an order affirming said judgment of the district court of Lake county, which judgment is in words and figures as follows, to-wit:

366 SAMUEL MCMULLEN, RONALD Morrison, and Eben Smith, Appellants,
vs.
THE FERRUM MINING COMPANY, Appellee.
No. 4215. Appeal from the District Court of Lake County.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Lake as also upon the matters assigned for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be and the same is hereby affirmed, and stand in full force and effect; and that this cause be remanded to said district court for such other and further proceedings according to law as shall be necessary to the final execution of the judgment of said district court, in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the court that said appellee do have and recover of and from said appellants its costs in this behalf expended to be taxed, and that it have execution therefor. And let the opinion of the court filed herein be recorded.

Which said opinion is in words and figures as follows, to-wit:

367 SAMUEL MCMILLEN ET AL., Appellants,
v.
THE FERRUM MINING COMPANY, Appellee.
No. 4215.

Appeal from the district court of Lake county.

Chief Justice CAMPBELL delivered the opinion of the court:

This is an action brought by plaintiffs below as the owners of the Eulalia lode in support of an adverse claim filed by them in the United States Land Office against the application for patent by the defendant for the Golden Rod Lode claim situate in Leadville mining district. At the close of the trial the court ruled that under the pleadings and evidence plaintiffs had not made out their case, and after instructing the jury as to the essential requirements of a lode location said that if defendant had complied therewith a verdict should be returned for it. There was a verdict for the defendant, and from the judgment thereon entered plaintiffs have brought the case here by appeal.

A number of rulings of the district court have been attacked as erroneous and argued by counsel which, were appellants in a position to complain, would merit most careful consideration. But since we have reached the conclusion that the trial court was right when

it instructed the jury that plaintiffs were not entitled to recover, because they had not shown a valid discovery of mineral in their location, it follows that many of the rulings attacked, even if
368 wrong, are not prejudicial to plaintiffs, and we, therefore, determine only that assignment relating to such discovery, as it is the only one of which they may complain.

1. The ground covered by the two claims is substantially identical. It was formerly included within the limits of the Winter lode, and a part of it was afterwards embraced within the exterior lines of the Pocket Liner lode. When, in 1893, plaintiffs' grantor went upon the ground, both of these claims were abandoned, and he proceeded to relocate as an abandoned claim the territory theretofore covered by them, and adopted the boundaries and stakes of the Winter location. He sank a discovery shaft to the depth of about twelve feet, and at the alleged point of discovery posted his location stake, and in due time filed for record his location certificate, in which, as we read it, the discovery is designated as in the discovery shaft.

At the trial plaintiffs admitted that this discovery shaft did not disclose a well defined crevice. On the contrary, they conceded that it had not passed through the wash and *debris* usually encountered upon Breece hill in the Leadville mining district. Notwithstanding that no discovery was in fact made in the discovery shaft, and the further fact that the location, as made, was based upon such alleged discovery, plaintiffs contend that since their grantor, the locator, at the time he sought to appropriate the ground as the Eulalia lode, knew of the existence of a vein within the limits of that claim as surveyed,—but several hundred feet distant from the discovery shaft of the Eulalia,—which he, together with his co-owners of the Pocket Liner lode, had previously discovered in the process of its development, this knowledge was equivalent to an actual discovery by him of a vein within the Eulalia location.
369 That plaintiffs' contention may be correctly stated here, though it involves some repetition, we quote what their counsel said when asked by the trial court his purpose in offering proof of a former discovery and in the Pocket Liner lode:

"Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen as an owner and a locator of the Eulalia lode knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he in company with the co-owners of the Pocket Liner claim had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States, and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc. etc. etc."

And again in the printed briefs counsel for appellants says:

"We claim for appellants that the discovery made by one of them, Samuel McMillen, in the Pocket Liner shaft, while thes ame was being sunk in the years 1879 and 1880, formed a complete compliance and performance of one of the two prerequisites prescribed by the acts of Congress to vest in him the complete possessory title to the Eulalia Lode mining claim, and that his entry upon the 30th of May, 1893, and distinctly marking the said claim on the ground and sinking a discovery shaft over a depth of ten feet, completed the other prerequisite to vest the title in him."

That the rulings of the trial court may also correctly appear, we take the liberty of reproducing what the judge said in reply to an attempt on the part of plaintiffs to show a discovery made by them in performing assessment work and doing certain other work subsequent to filing their location certificate. "You can," said the judge, "prove this, if possible, any discovery which you made on that ground. I care not where it is, or in what shaft it is, if you have made a discovery, prove it." And again: "If in 1895, you made a discovery upon that ground, and you claim under that discovery, you may go to work and prove your claim under that discovery."

370 From the foregoing it is apparent that learned counsel for appellants (plaintiffs below) contends that mere knowledge by the Eulalia locator of the existence of a vein in the Pocket Liner made his location valid, provided he performed the other statutory acts of location aside from the actual discovery of mineral.

It has been held that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location. If it appear that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, he may base his location upon it, and thus avoid the necessity of making a discovery for himself. The following are some of the cases:

Book *v.* Justice Mining Co., 58 Fed. 106, 108;
Jupiter M. Co. *v.* Bodie Cons. M. Co., 11 Fed. 666;
Conway *et al. v.* Hart, 129 Cala. 480;
Hayes *v.* Lavagnino, 17 Utah, 185;
Wenner *v.* McNulty, 7 Mont. 30;
O'Donnell *v.* Glenn, 8 Mont. 248;
Nevada Sierra Oil Co. *v.* Home Oil Co. *et al.*, 98 Fed. 673.

But as stated by Judge Ross in the oil company case, *supra*, not only must the locator "have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location." That is to say, the locator must claim and adopt such previous discovery as his own and base his location upon it.

In the O'Donnell case, *supra*, the supreme court of Montana, it is true, held that the locator was not confined to the nominal discovery

shaft, but might select some other place within the limits of the location and show a valid discovery there. But that decision,
371 as the opinion clearly shows, was based upon section 2320 of the Revised Statutes of the United States, which merely provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and the supreme court of Montana aptly observed that there is no provision for a discovery shaft in the Federal statute or any statute of Montana. The court further said that the fundamental mistake in the argument of counsel that a locator was not permitted to select at will any shaft besides the nominal discovery shaft, was "that it assumes that a notice on the ground, at the point of discovery, is necessary when it is not required by law."

Obviously, had there been in Montana, as there is in Colorado, a statute which specifically declares that the locator shall sink a discovery shaft to the depth of at least ten feet showing a well defined crevice, and shall also post at the point of discovery a location stake, the decision there would have been otherwise. And, whatever our views might be when the question is presented, it is a fair inference from the opinion in that case that where, in States that have provisions for discovery shafts and posting of notices on the ground, like our statute, the locator himself selects the discovery shaft as the one in which the discovery of mineral has been made, and there posts his location stake, and bases his location upon such discovery, he may not, after intervening rights have attached, abandon and disregard the same, neglect to comply with such provisions, and select another discovery upon which his location was not predicated.

Now, when tender of proof was made by plaintiffs' counsel of the former discovery, there was no offer to show that it was
372 claimed by their locator or adopted by him as the one on which the Eulalia location was made. For this reason alone the court was justified in refusing to hear the proof offered, for it did not meet the requirements of the decisions in which the doctrine is laid down that a former discovery may be the basis of a valid location.

It is true that in tendering instructions plaintiffs submitted one which contained the element of an adoption by the relocator of a former discovery as the one upon which his own location was based. There was no error by the trial court, however, in refusing to give this instruction, because there was no evidence, or offer of evidence, by plaintiffs that called for it. The fact that plaintiffs' grantor knew and claimed that there had been a former discovery is not equivalent to, nor does it supply the place of, its selection by him as the one on which his location is based, particularly in the light of the declaration in the location certificate that the discovery of the Eulalia location was made in a discovery shaft in no way connected with, and some hundred feet distant from, the place where the former discovery is said to have been made. It follows from what we have said that plaintiffs have not brought themselves within the doctrine

they contend for, and are not in a position to invoke its application to their case as made.

2. There is another reason for holding that plaintiffs may not avail themselves of that rule. It appears that they not only do not question the validity of our State statutes which prescribe certain acts as necessary to a valid location, but in their complaint they aver that, in the location of the Eulalia lode, the provisions
373 of the State, as well as of the Federal, statutes were complied with; and among the instructions which they themselves asked the court to give was one,—applicable both to their own and the Golden Rod location,—in which was the declaration that, as provided by section 3152 M. A. S., a valid location of a lode mining claim cannot be made unless the locator sinks a discovery shaft upon the lode discovered to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface or deeper if necessary to show a well defined crevice, and unless he posts at the point of discovery on the surface a location stake containing certain designated things.

Such being true, plaintiffs certainly cannot now be heard to say that they may at their will disregard these mandatory provisions of State legislation which they themselves have invoked, for, if we assume their validity (which plaintiffs themselves do not question, and which they declare they have complied with), the discovery shaft must expose the vein upon which the location of the Eulalia lode was based, or at least one vein, and a discovery elsewhere within the limits of the claim will not supply its place.

Beals *v.* Cone, 27 Colo. 473, 499.

Lindley on Mines at section 250 (15) says that State courts have uniformly enforced provisions like those of ours concerning discovery shafts and posting of notices, notwithstanding doubts by the Interior Department as to their validity. See, also, Van Zandt *v.* Argentine M. Co., 8 Fed. Rep. 725; *ibid.*, 122 U. S. 478; and Morrison's Mining Rights (9th ed.) 29. But, as already shown, plaintiffs are not questioning their binding force and are not in a position to do so.

374 3. From what has already been stated, it is clear that the trial court did not preclude plaintiffs from showing a valid discovery of mineral within the limits of the Eulalia location before the rights of defendant attached, though from a superficial examination of the record the contrary might appear. The assertion that defendant has failed to establish a valid location is not borne out by the evidence. Defendant's proof in that behalf is amply sufficient to show a valid location assuming, as the record justifies, that plaintiffs' location was invalid.

We feel it to be our duty not to close this opinion without expressing our disapproval of the severe strictures made by counsel for appellants upon the rulings of the trial court. Doubtless he sincerely believed that injustice had been done his clients, but

sarcastic references to the trial judge and invective employed against him do not aid appellate courts in determining legal controversies.

A careful examination of this record satisfies us that no error was committed by the trial court of which appellants may complain. The judgment should, therefore, be affirmed, and it is so ordered.

Affirmed.

(Endorsed:) Filed in supreme court Oct. 6, 1902. Horace G. Clark, clerk.

And thereafter, on to-wit the 20th *od* October, 1902, said appellants filed in said supreme court their petition for a rehearing, which petition is in words and figures as follows, to-wit:

375 In the Supreme Court of the State of Colorado.

SAMUEL MCMILLEN, RONALD MORRISON, and Eben Smith, Appellants, *v.* THE FERRUM MINING COMPANY, a Corporation, etc., Appellee.	No. 4215. Petition for Rehearing.

And now come the appellants herein, by their counsel, George R. Elder, and file this their petition for a rehearing in the above entitled cause, and for grounds for granting such rehearing allege:

I.

That the court erred in its finding that appellants, plaintiffs below, were not entitled under section 2320 of the Revised Statutes of the United States, to prove the discovery of and existence of a lode and vein of gold and silver ore within the limits of their Eulalia location, antecedent to and prior to their location of said ground, upon the 30th day of May, A. D. 1893, whether made and discovered by themselves or other parties; and that they knew and claimed at the time of making their location, that there had been a discovery of a vein or lode within the limits of their location, and that the construction given by the supreme court of Colorado of this Federal statute was adverse to and not in accordance with the decisions
376 of the United States circuit courts for the districts of Nevada and California in the cases of Jupiter M. Co. *v.* Bodie Cons. M. Co., 11 Fed. Rep. 666, Book *et al. v.* Justice Mining Co., 58 Fed. Rep. 106, Nevada Sierra Oil Co. *v.* Horne Oil Co., 98 Fed. Rep. 673, and that the construction put upon that part and portion of section 2320, United States Revised Statutes, which reads as follows: "and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made," was

erroneous and against the rights of appellant's locators in this that it cannot be presumed that the United States laws or the United States statutes required a foolish and unnecessary thing, a discovery having been made below a depth of 10 feet within the claim, and being known and adopted by the locators by their staking the claim, recording the same and posting a notice upon the claim, all in the regular and usual form of procedure, that they should be required to embody the facts in their location certificate that a vein had been discovered in the Pocket Liner shaft at a depth of 90 to 110 feet in 1879, or to set out in their location certificate that a vein or lode had been discovered in the Winter shaft at a depth of 290 or 300 feet in 1879, and that their Eulalia claim was a relocation of either the Pocket Liner Lode claim or the Winter Lode claim, or of both of said claims; and the court erred in deciding that appellants were not entitled to prove these facts on the trial, unless, forsooth, they had so stated in their location certificate; and no such logical conclusion can be drawn from the decision of Justice Ross in Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed. Rep. 673.

377 That such construction of the evidence offered by appellants is in direct opposition to and in contravention of the construction given of that part of section 2320 of the Revised Statutes of the United States which says: "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located" as given by the following decisions:

Book *v.* Justice Mining Co., 58 Fed. Rep. 106;
Jupiter M. Co. *v.* Bodie Con. M. Co., 11 Fed. 666;
Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed. Rep. 673;
Erwin *v.* Perego, 93 Fed. Rep. 611;
Conway *v.* Hart, 62 Pac. 44;
Hayes *v.* Lavagnino, 53 Pac. Rep. 1029;
Werner *v.* McNulty, 14 Pac. Rep. 643;
O'Donnell *v.* Glenn, 8 Mont. 248; 19 Pac. Rep. 302.

If the decisions of Judges Sawyer, Hawley and Ross of the United States bench and Justices McFarland, Bartch and McConnell of the supreme courts of California, Utah and Montana, in construing sec. 2320 Revised Statutes of the United States, as above referred to, mean anything, they mean that a locator who places his stake and notice upon an abandoned location of a mining claim, and records a location certificate, claiming the same under the mining statutes of the United States, has the right to prove the exact offer made in the case below that:

"Appellants were entitled to introduce evidence that at and prior to their location of their Eulalia lode, upon May 30th, 1893, there had been a discovery theretofore made of a vein or lode of quartz or other rock in place, bearing gold and silver, whether made by themselves or other parties, and that they knew and claimed at the time of making their location, that there had been a discovery of a vein or lode within the limits of their location."

The vested right of Samuel McMillen as a locator of the Eulalia lode, by his staking and claiming the Winter lode and his former discovery of a vein or lode in the Pocket Liner shaft within the limits of his claim under section 2320 of the Revised Statutes
378 of the United States, is lightly swept away by this honorable court, because the notice and stake were not at the Pocket Liner shaft; and yet this court will search this record in vain to find that appellees, defendants below, ever placed a notice of discovery at the Pocket Liner shaft or at any other place upon the premises in dispute, except within 15 or 20 feet of the place where Mr. McMillen posted his notice of discovery; and that the filing of their third amended location certificate upon March 8th, 1895, in the recorder's office of Lake county, by appellees, claiming the Pocket Liner shaft as the point of discovery, could never make up for their failure to place a notice at their point of discovery. The locators of the Golden Rod lode, the appellees, posted their only discovery notice at their original discovery shaft, which was within two feet of the discovery shaft of appellants, and if truth lies in the homely proverb "What is sauce for the goose is sauce for the gander," we could apply this court's language to appellees' case. "The locator himself selects the discovery shaft as the one in which the discovery of mineral has been made, and there posts his location stake, and bases his location upon such discovery; he may not, after intervening rights have attached, abandon and disregard the same, neglect to comply with such provisions, and select another discovery upon which his location was not predicated."

On pages 99 and 100 of the abstract, the surveyor Smith testifies he placed the ordinary location notice at the original discovery shaft of the Golden Rod lode, and no other or different notice was ever placed by appellees upon said ground, and the reasoning of the court would be absolutely fatal to the claim of title of appel-
379 lees. Indeed that notice would be still standing, and in the purview of the law is still standing to dispute the claim of title set up and relied upon by appellees, by the recording of their third location certificate. This is unanswerable, and absolutely refutes the statement of this court that "defendants' proof in that behalf (of a valid location) is amply sufficient to show a valid location."

II.

That this court erred in refusing to consider the second, third, fourth, fifth, twenty-fourth and thirtieth assignments of error of the appellants, at all.

Briefly, it may be stated that in September, October, November, and December, 1894, appellants drove a drift from the workings of the Little Vinnie Lode mining claim at a point 380 feet from the surface of the earth into the southeast fraction of their Eulalia claim a distance of over sixty-four feet, and also constructed and opened certain upraises and stopes, and that in these workings, within the

limits of their Eulalia location, they opened and disclosed a large and valuable vein of gold and silver bearing ore in rock in place, and from this vein shipped large quantities of gold and silver bearing ore to the smelters. See plate shown, page 53 of the abstract, Plaintiff's Exhibit 24. And this was all done and accomplished before defendants' claim of title in the old Pocket Liner shaft first made by them by filing their third amended location certificate upon March 8th, 1895, attempted to claim a discovery in the Pocket
380 Liner shaft. The court below refused to allow plaintiffs to prove by Surveyor Smith the extent of these workings by a map of the same, and by M. N. McInnis, a miner who worked there, the presence of a vein, and pay mineral being shipped from that ground. Pages 51, 52, 54, 55, 56, 57, 58 and 59 abstract.

In our brief on page 65 we make this statement:

"Our supreme court has expressly and conclusively recognized the right of a discoverer of a lode made from an adjoining claim by and through a cross-cut, a tunnel or a level, the opening of which is entirely off the ground so located.

The case is Hall *v.* Kearney, 18 Colo. 505."

The Kearney case was decided April term, 1893, and was the law of this State February 7th and 8th 1900, when the trial court refused to receive such evidence, using the following language, page 55, abstract:

"The COURT: I hold most emphatically this: That you cannot have a secret or concealed discovery, from an opening in another claim, or on Government land."

Appellant's brief was filed in the summer or fall of 1900, and we deemed it unnecessary to file a reply brief containing the luminous decision of Justice Campbell of December 17th, 1900, in the case of Brewster *v.* Shoemaker, 28 Colo. 176, which is so opposite to the hasty, unconsidered decision of Judge Owers that we cite. Page 181.

"Certainly there is no requirement of the Federal statute that a vein shall be discovered from the surface. The only requirement in that respect is that the place of discovery shall be within the limits of the claim. Under our statute (Mills Ann. Stat. sec.
381 3154 Gen. Stats. 1883, sec. 2403) where a lode is cut at a depth of ten feet below the surface, by means of an open cut, cross-cut or tunnel, it is the same as if a discovery shaft were sunk on the vein to that depth."

Assuredly since the claimants of the Golden Rod location had no valid location under any circumstances until their amended location certificate of March 8th, 1895, they having filed their second amended certificate December 14th, 1894, claiming their original discovery shaft, as in their first location certificate, January 29th, 1894, the trial court committed manifest error in refusing appellants their undoubted right to prove their discovery from a drift or cross-cut over the side-line of the Little Vinnie lode.

And Justice Campbell upholds every contention of appellants in

this case, when he states, page 180 of the Brewster *v.* Shoemaker case:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or file a new one."

Counsel for appellants is at a loss to understand why Justice Campbell overlooked the fact that appellants were not per-
382 mitted to prove the disclosure of a vein or lode of gold and silver ore through the drift from the Little Vinnie lode at 380 feet from the surface, this being made in the months of October and November, 1894, while appellees were still claiming by their location certificate filed December 14th, 1894, pp. 209, 210 and 211 abstract, the twelve foot discovery shaft originally claimed by them in their location certificate recorded January 29th, 1894. Pp. 101, 102, 103 abstract.

The pay-roll sheets of the Eulalia lode or mine for the months of October and November, 1894, pp. 22 and 24, contain the names of at least seven miners subpœnaed by appellants, and present in court at the trial of the case, who would have proved beyond peradventure the presence of a vein or lode in the sixty-four foot drift from the Little Vinnie lode and in the stopes above it. They would have proved the breaking of pay ore from the vein between the porphyry and the quartz in the stopes, the hoisting of it to the surface, hauling it to the smelter, weighing it, sampling it, control assays, smelter settlement sheets, and checks for the proceeds from the smelter company, and all of these things prior to any claim by appellees of any other discovery than that where their original discovery shaft was located.

We therefore claim that this court shauld have passed upon our second assignment of error, pp. 275 abstract, raising these points, and that the court should grant a rehearing upon this point alone, as manifest injustice has been done appellants in the court's failure to pass upon this point.

Upon pages 57 and 59 of the abstract occurs the two rulings of the court below of which we complain. We quote:

383 "Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the underground workings of the Little Vinnie claim?

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court, plaintiffs by their counsel then and there duly excepted."

P. 59. "The court has already decided that such a drift does not constitute a discovery."

"To which ruling of the court plaintiffs, by their counsel, duly excepted."

Appellants claim that these rulings were in direct opposition to and in contravention of their rights, under section 2320 of the Revised Statutes of the United States, and the failure of the supreme court of Colorado to pass upon this assignment of error permits a false application and construction of this statute, contrary to the current of the decisions of the United States courts, the other mining States, and even their own decisions.

Appellants further contend that these rulings were in violation of the rights of appellants, not only under section 2320 of the United States Revised Statutes, but also in contravention of their vested rights under section 7 page 127 of the General Laws of 1874 of the Territory of Colorado, which is section 1817 page 630 Gen. Laws of Colorado, 1877, and which is sec. 2403 page 733 Gen. Stat. 1883, Mills Ann. Stats. sec. 3154, viz:

384 "Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

The supreme court of this State has announced in Brewster *v.* Shoemaker, 28 Colo. p. 181: "Certainly there is no requirement of the Federal statute that a vein shall be discovered from the surface."

And when Judge Owers makes a ruling directly opposite to this, and is asked the following question, page 55 abstract:

"Mr. ELDER: Does your honor hold that the United States statute requires any such thing?"

He answers:

"The COURT: I hold most emphatically this, that you cannot have a secret or concealed discovery from an opening on another claim, or on Government land."

All of this is clearly reversible error and an invasion of appellant's rights under the United States statutes, and the statutes of Colorado, as well as the decisions of the supreme court of Colorado.

We fail to see the force of the supreme court's determination that they do not consider the rulings under this assignment of errors as prejudicial to plaintiffs and therefore decline to consider it.

III.

385 Upon page 3 of the opinion of the supreme court occurs a specious reference to the liberality of the trial court, quoting his language: "You can prove this, if possible, any discovery which you made on that ground. I care not where it is, or in what shaft it is, if you have made a discovery, prove it.

"If in 1895 you made a discovery upon that ground, and you claim under that discovery, you may go to work and prove your claim under that discovery."

Now this is all very beautiful if the court meant what he said, and acted upon it. Promise, but no performance. The plagues of Tantalus and Sisyphus were simply idle dreams to the concealed club the court held over the plaintiffs for the benefit of his mining partners, Mr. Estey, the president of the Ferrum Mining Company, appellees herein, also superintendent of the Royalty Mining Company, of which Judge Owers was the largest stockholder and was secretary. The club was an illegal writ of injunction issued at the instance of the Ferrum Mining Company upon January 19th, 1895 against appellants, nearly two months before March 8th, 1895, when the third amended location certificate of appellees was filed. And this entire case was tried by the court on the theory that he had the power to exclude appellants from the Pocket Liner shaft permanently and for all time under section 159 of the Code of Civil Procedure, and the effect of this ruling which the supreme court looks upon as so generous and liberal to plaintiffs was to try this case in his injunction hearing January 19th, 1895; because the court himself was
386 the first to tell J. J. Green, the witness of plaintiffs who drove the first level in the Pocket Liner shaft on the only vein in that shaft a distance of forty feet, while doing the assessment work for plaintiffs in the years 1895, 1898 and 1899. P. 69 abstract,

"The COURT: You could not take possession of that shaft in violation of the injunction. I could not allow you to show work on that shaft during the pendency of this injunction."

The mediæval Pope's bull against the comet is common sense and pure reason beside this pronunciamento of Judge Owers as to his powers under section 159 of the Code. The fact is that when the agents of the Ferrum Mining Company, the plaintiffs in that writ of restitution, walked away from the Pocket Liner shaft, after they had been put in possession, and remained away continuously, the writ became "*functus officio*," and was as dead as Lazarus, and was of no effect to keep plaintiffs from quiet and peaceable entry to do their assessment work, and further develop the vein Samuel McMillen discovered in 1879. If these rulings, refusing testimony of a discovery in that north drift in the Pocket Liner shaft, show a knowledge of law and the just limit of the powers of district courts of Colorado, in injunction writs, then of course, the merciful treatment of plaintiffs in the admission of testimony was highly and extravagantly liberal to appellants. The mystery to counsel is that the supreme court of Colorado would allow such a manifest invasion of property rights by a district judge to go uncriticised, and the assignments of error Nos. six, seven and thirty-two to be passed without comment.

387 If, as undoubtedly was the case, the plaintiffs in that writ of restitution were limited "only to the right of possession under the facts of the case in respect to the manner in which the pos-

session was obtained, as specified in section 159 of the Code, then appellants had as much right to enter that shaft in the absence of the Ferrum Mining Company, as any part of the ground within the boundaries of their Eulalie location; and Judge Owers' construction arbitrarily tried this ejectment case by his injunction hearing in January, 1895, instead of in February, 1900. This error alone should have reversed this case, and a rehearing should be granted to appellants, to at least present their side fairly to the court.

IV.

The court erred in failing to pass upon appellants' assignment of error No. fifteen,—page 280 abstract:

"The court erred in refusing and declining the request and application of plaintiffs to send the jury empaneled in the case in a body to view and inspect the premises, as provided by section 188 A of the Code of Procedure against plaintiffs' objection and exception saved." See page 249 abstract.

Plaintiffs' request that the jury be taken to the premises and given an opportunity to examine the shafts and drifts.

But the court refused to grant said request, and to send the jury to the premises in dispute.

To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

It was the imperative duty of the court to send the jury to view and inspect the premises.

388 Section one (1) of the said act of April 3d, 1893, page 78 Session Laws 1893, is as follows:

"SECTION 1. In all suits, actions and proceedings now pending, or which may hereafter be brought, in any court of this State, involving the title to, the right of possession of, or the mineral contained in any mine or mining claim, *it shall be the duty* of the court, at the trial of such suit, upon the application of either party interested therein, to send the jury empaneled in the case, in a body, to view and inspect the premises."

With this vested right denied to plaintiffs in the trial of their side of the case, we are again at a loss to see how this honorable court can, by any process of legal reasoning and deduction, reach the conclusion, as stated in the first page of their opinion,

"It follows that many of the rulings attacked, even if wrong, are not prejudicial to plaintiffs."

There was a positive contradiction of testimony as to the presence of any vein or lode in the entire length of the second drift of the Pocket Liner shaft, three of defendant's witnesses positively swore to four veins in the forty-six feet of porphyry that this drift was run in; their fourth witness found a fifth vein in the same drift; four of defendant's witnesses testified that there was no vein or lode whatever in the whole course of that forty-six foot drift; and this latter testimony was given by one of the men who worked in that drift as

the lessee of the Ferrum Mining Company, Charles Slavin. The plaintiffs had at least ten more witnesses in the court room to testify, and who would have testified that there were no veins whatever in that drift. On page 243 of the abstract, the court will find after the calling of Malcom G. Alexander as a witness in rebuttal,
389 by plaintiffs, the illegal, arbitrary and unjust ruling of the court in confining plaintiffs to four witnesses. If a preponderance of testimony depends upon number of witnesses to prove or disprove a fact, a limitation of this character is a violation of plaintiffs' rights. Indeed the testimony of Charles Slavin that he worked in that drift and found no vein from end to end of it, is worth more as testimony than all the magnifying processes of testimony used by defendant's expert witnesses, Messrs. Boehmer, Mudd, McDonald and Curley, who could magnify cracks and cleavages in the same class of porphyry to the dignity of veins.

Again these famous experts gave the dip of these veins as to the west,—now Charles Slavin sank that shaft 150 feet deeper, and he testifies, pages 201, 202 and 203, that he found nothing but porphyry in going down that shaft, and the only vein they ever had in that shaft clear to the bottom of it at 288 feet, there was but one vein in the shaft, and this was the one that he found in 1879 when he was an owner in the Pocket Liner shaft, at about 100 feet from the surface. Now it is a patent fact that a vein found four feet from this shaft in the southeast drift described by Mr. Boehmer, pages 138 and 140 as dipping 76° to the west, would take that vein through and across the shaft as sunk by Mr. Slavin long before it reached the bottom, and he swore there was no vein in that shaft below that east level and that fact is undisputed, and this testimony was defendants' own testimony when called by them, page 197, abstract, bottom of the page, when speaking of the vein discovered by them in 1879.

"A. Yes, sir; the only vein that I know of in the shaft."

390 Now unless Mr. Boehmer's diagnosis of the dip of this vein was not correctly taken as 76° to the west, the conclusion is inevitable that nature carried this vein directly across the shaft only four feet west of the point stated by Mr. Boehmer, or else Mr. Slavin lied both in reply to Mr. Ewing's interrogatories, when on the stand for the defendants, or he did the same thing again in answer to plaintiff's interrogatories. On the contrary, if he told the truth, it was no vein at all, and had no continuity, and the statute of April 3d, 1893, was passed in its mandatory and imperative form so that the jury could go to the very point in dispute, inspect that drift from end to end, and then say whether Mr. Boehmer and his sharp-sighted expert compeers lied, or whether Charles Slavin, the man who drove that drift, lied, and the three other witnesses of appellants.

This court cannot afford to go on record as saying that a mandatory provision of the Code of Practice of this State evidently given to protect and control these mining suits from the gross perjury known to the bar and the people for so many years in Colorado, can

be disregarded by a court who prejudged the case of the plaintiffs from the start, and then threw the door wide open for the defendants to prove whatever they liked. It is a safe statement that this very sitting bench has never reversed a case before them for a more palpable grievous error than this one plainly committed by the court. It is the sworn duty of the judges of this court to pass upon this assignment of error No. fifteen, that the people of this State may know that section 188 A of the Code could not be invoked as a protection for their rights as citizens, and in the attempt to
391 prevent a sacrifice of their property, by using the jury and to perhaps correct the too prominent and heavy bias of courts and judges in the trial of causes. If for any reason, this trial is a special exception from the limitation of that section of the Code providing that

"In all suits, actions, etc., * * * involving * * * the right of possession of * * * any mine or mining claim," we desire this court to say so, and say it plainly, because the bar of the mining districts of the State are using section 1 of the act of 1893, page 78, Session Laws every day, and if it is a dead letter and is not a rule of practice that must be followed by the court when asked in the trial of such cases, it will then not be the fault of this honorable court if counsel waste further time in considering it a mandatory and imperative part and portion of the code.

Judge Owers limited counsel to a thirty minute discussion before the jury over the facts of this large and important case, over the exception of counsel, after arbitrarily throwing out all the testimony of plaintiffs. We would have been content with an argument of five minutes if he had obeyed the law and sent that jury to inspect the east drift of the old Pocket Liner shaft, and we can assure this court they would not have been annoyed with an examination of this case as they have been.

There are now cases on appeal from this district judge where almost the sole error alleged is the failure of the court to send the jury to the premises to inspect the ground and the openings testified to, and this honorable court will be the first to regret that they have done injustice in this particular case, when a decision is made
392 by one of the appellate courts of this State that the section we complain of is mandatory and a refusal to grant its beneficent use is reversible error, if the only error alleged in the case.

If this were an insignificant error and did not bear so heavily upon a correct settlement of the rights of plaintiff, we would not insist that the plaintiffs have the undoubted right to a rehearing to properly apprise the court of the value of this privilege to them.

V.

The court erred in refusing to pass upon assignment of error No. ten, admitting the testimony of Eugene Stevens and the assay card, Defendant's Exhibit C, and the testimony of John King. See pp. 127 and 134 abstract; also pp. 95, 96 and 97, Appellant's Brief. The

court said: "With the understanding that it is to be connected with a lode in rock in place, it will be admitted." There never was any testimony connecting this material with a lode or vein introduced or proved in the case by defendants; and assignment of error No. 26, being to the giving of instruction No. four, based upon it asked by defendants, where the date of the assay card admitted in evidence was March 10th, 1894. The court must understand that an assay card showing seven ounces in silver and three-hundredths in gold improperly admitted to the jury, would have far more effect on the jury than the infinitesimal assays which Mr. McDonald laboriously picked from the cleavages and selvages of this blind porphyry drift; and if we are to believe anything of the testimony of defendants at all, a chance piece of red porphyry, taken at random by Mr. King from that drift ran from fourteen to forty times what Messrs. Boehmer, Mudd, McDonald and Curley could gather by minute ex-
393 amination of the whole drift. Any common miner could tell this court from his own experience on Breece hill, that the stained red porphyry of the hill will run more than the imaginary veins of these experts. We therefore ask the court to open this matter, that we may more at large discuss this too palpable error in the case.

VI.

The court erred in failing to consider and discuss appellant's assignment of error number thirteen, which was as follows, p. 279 abstract:

"13. The court erred in permitting defendants to introduce in evidence their amended and additional location certificate, changing their discovery shaft from a point 375 feet from their east end-line to a point over 1,000 feet west of their first discovery shaft, the date of the change being March 8th, 1895, and no proof being submitted of the placing of a new discovery notice at this new discovery shaft."

Now, if counsel understands the trend of the opinion of the supreme court at all, it places the greatest weight upon the fact that Samuel McMillen, the locator of the Eulalia lode in the name of John Kennedy, put up no discovery notice at the Pocket Liner shaft, at the Winter shaft forty feet from his discovery shaft (in which there is also a discovered and disclosed vein, and was at the time of McMillen's location), or at the point on the surface as near as could be ascertained over the vein and pay ore disclosed by him in his drift and stopes from the 380 foot level of the Little Vinnie claim.

394 In the discussion the court gives of the Montana case, O'Donnell *v.* Glenn, 8 Mont., 248, on page 5 of the opinion it says:

"Obviously, had there been in Montana, as there is in Colorado, a statute which specifically declares that the locator shall sink a discovery shaft to the depth of at least ten feet, showing a well-defined

crevice, *and shall also post at the point of discovery a location stake*, the decision there would have been otherwise."

We have quoted from the opinion as rendered by Chief Justice Campbell, for the purpose of asking this court if they knew when they assented to the opinion affirming the judgment below, that defendants made no proof whatever that a discovery notice was ever placed at the Pocket Liner shaft by defendant company or its grantors, Messrs. Estey and Limburg. There is proof that Mr. Smith placed a discovery notice at the 12-foot hole sunk in the wash and debris 375 feet from the east end line of the Golden Rod claim, to which the names of R. B. Estey and Charles T. Limburg were signed, and in the purview of the law, that is their discovery shaft, and so remains to this day.

If the accidents of time had permitted that stake and notice to remain on the side of that twelve-foot discovery shaft, how, under the construction the court has given to the mandatory requirement for such notice, in the absence of a posted notice at the Pocket Liner shaft, could the record of fifty additional and amended location certificates disprove the continuous and everlasting evidence that Mr. Smith placed the only discovery notice under which defendants could claim any discovery of mineral at this twelve-foot hole on the east end of the claim.

395 If your honorable court is going to deal out even-handed and exact justice, you must require the defendants also to post a discovery notice at the point of discovery before you will permit them to prove the main prerequisite of the Revised Statutes of the United States, the discovery of a vein, having made that requirement against appellants.

You have said on page 8 of your opinion that "defendant's proof in that behalf is amply sufficient to show a valid location."

Now we venture the assertion that if the member of the court who wrote that clause knew at the time he wrote it that neither the Ferrum Mining Company nor Messrs. Estey and Limburg had placed a discovery notice at the Pocket Liner shaft on the 8th of March, 1895, or at any other time, he would not have called that valid which was invalid.

Again on the 14th of December, A. D. 1894, the Ferrum Mining Company filed, see Exhibit G pp. 209–210–211, abstract, their second location certificate, calling it a further additional and amended certificate of location, in which they still claimed their 12 foot hole in the wash as their discovery shaft, and it must be presumed that it so continued until March 8th, 1895.

There is one fact apparent in this whole case, which your honorable court has ere this discovered, that the trial court sustained every objection of the defendants at the time of the trial, and that no objection of plaintiffs in the whole conduct of the case was sustained. To such an extent was this carried that he aided defendant's counsel by a self-suggested objection upon the question of "a

secret and concealed discovery," and by a quick reference to
396 his unlimited injunctive powers, which this honorable court will remember was issued some two months before March 8th, 1895, when if ever, defendants had the slightest shadow of a title.

We desire now to apologize to the court for our failure to answer the flimsy reply brief filed in answer to our opening brief, and to set this case for oral argument. We are unfortunately of that class of lawyers who have an inbred belief that the judges of the appellate courts can read between the lines, and that they do not need oral arguments to call their attention to salient points in cases before them.

We believe that Mr. McMillen having made a discovery of a lode or vein of precious metal in 1879 in the Pocket Liner shaft, some thirteen years before the 30th of May, 1893, was not required by the statutes of the United States to make his discovery over again.

We believe that Mr. McMillen's discovery and working of a vein of gold and silver ore from the lines of the Little Vinnie lode in the fall of 1894, within the limits of the Eulalia location, some six months before March 8th, 1895, when defendants made their first claim to a discovery shaft of the Pocket Liner shaft, was a full compliance with the requirements of section 2320 of the Revised Statutes of the United States, and this occurring before any valid adverse rights had intervened, was a perfect and complete appropriation of this ground, and should have been so adjudicated.

Wherefore, we respectfully petition this honorable court for a rehearing of this case.

Respectfully submitted, GEORGE R. ELDER,
Counsel for Appellants.

Leadville, Oct. 17, 1903.

397 (Endorsed:) No. 4215. In the supreme court of the State of Colorado, Samuel McMillen *et al.* appellants, *vs.* The Ferrum M. Co., a corp., etc., appellee. Petition for rehearing. George R. Elder, attorney for appellants. Filed in supreme court Oct. 20, 1902, Horace G. Clark, clerk.

And thereafter, on to-wit the 7th day of December, A. D. 1903, the supreme court of the State of Colorado entered an order denying said petition for rehearing, which said order is in words and figures as follows, to-wit:

SAMUEL MCMILLEN ET AL., Appellants,
v.
THE FERRUM MINING COMPANY, Appellee. } No. 4215.

At this day upon consideration thereof, it is ordered by the court that the petition of appellants for rehearing herein be and the same is hereby denied and the original opinion adhered to. And let the opinion of the court filed herein be recorded.

Which said opinion is in words and figures as follows, to-wit:

398 No. 4215.

On petition for rehearing.

Chief Justice CAMPBELL delivered the opinion of the court.

In the oral argument in support of their petition for rehearing, counsel for appellants confined himself to three general propositions, and to these will our discussion be mainly devoted.

1. That the locators of the Eulalia lode might have availed themselves of a previous discovery within the limits of that location, and might have adopted the same as their own and based their location upon it without making a valid discovery for themselves, there can be no doubt under the authorities cited in the foregoing opinion. Appellants' argument as to this point may be dismissed with the single observation, which, in fact, has already been made, that they did not do so. The record clearly shows that they have not brought their case within the principle contended for, since in their offer of proof they expressly rely upon mere knowledge of a former discovery and make no pretense of having adopted it as their own. It is apparent that appellants, while right in their statement of the law, are wrong in supposing that the facts of this case call for the application of any such principle.

2. Appellants again call to our attention their assignments of error directed against the rulings of the trial court refusing their offer of proof of a discovery within the limits of the Eulalia made through the underground workings of the Little Vinnie claim. In the original opinion no special reference was made to this
399 position because the radical defects in appellants' proof as shown by their offer and by the record, did not seem to us to call for an application of the rules of law invoked. Further investigation, particularly in the light of the oral arguments on this rehearing, clearly demonstrates the fallacy of this claim. As we have already determined, appellants' location of the Eulalia has no standing at all, if based upon a former discovery made in 1879, or upon the one alleged to be made in May 1893 at the time they went upon the ground and made their location, and which is admitted to be in the wash which covers the side of the mountain. At the trial, though no such claim is made in the complaint, there was an attempt to show a valid discovery made from the adjoining Little Vinnie lode. When the trial court ruled that a valid discovery could not be made from an opening on another claim or Government land, it was error, but in view of the facts on which appellants themselves admit their present contention is founded, such ruling was not prejudicial for the reasons which we now state. If it be granted that such a discovery was made, appellants wholly failed to follow

it up by doing the other essential things which we said in Brewster *v.* Shoemaker, 28 Colo. 176, should be done in order to perfect an underground discovery.

This underground discovery is said to have been made between the months of September and December, 1894. If so, we fail to see how it can avail the appellants, for earlier in the year of 1894 the appellee, as the jury must have found, and as the evidence abundantly shows, made a valid discovery in the old Pocket Liner shaft within the present boundaries of the Golden Rod location. This discovery, as well as the location based upon it, is prior to that of ap-
400 pellants, whether or not the law requires in such circumstances an amended, or additional, location certificate to be filed. If the law does not require such filing, appellee's location of the Golden Rod is superior to the Eulalia, for the former is first in point of time; but if such location certificate must be filed still appellee must prevail, for appellants have never filed such certificate at all, and appellee, in March 1895, filed its amended location certificate in which it bases its location upon the discovery made in the Pocket Liner shaft. It therefore conclusively follows, according to the facts as appellants themselves on the oral argument admit them to be, that there was no prejudicial error on the part of the trial court in rejecting appellants' offer of proof of a subsequent underground discovery since, if it was made, it was not until after appellee had made a valid discovery, and perfected its location, of the Golden Rod.

3. Section 188*a* Mills' Ann. Code, declares that in a suit like the one at bar it shall be the duty of the court at the trial, upon application of either party, to send the jury empaneled in the case in a body to view and inspect the premises. At the trial below the plaintiffs made such application. Whether they complied with other provisions of the same statute as to advancing the expenses which a compliance with the request involves, we do not pause to inquire; for the assignment attacking the ruling denying the request may be disposed of on more satisfactory grounds. In Connolly *v.* Hughes — Colo. App. — (71 Pac. Rep. 681) our court of appeals, assuming that the provision of the statute was mandatory, held that it did not apply to a case, such as was then before the court, where
401 the party making the request had not introduced any evidence to establish his case. We think that ruling was right, and the principle applies to this case. Although the plaintiffs here did introduce evidence to establish the validity of their title, they wholly failed to make out a case for submission to the jury.

We may fitly observe that appellants, in insisting upon their right to have the jury inspect the Pocket Liner shaft for the purpose of enabling it to discover whether or not a vein of mineral was disclosed therein, are so inconsistent with another, though not the sole, claim made by them, namely, that the validity of their own location depends upon a former discovery made in the same shaft in 1879, that their supposed grievance at this ruling of the court does

not impress us as meritorious. It would seem to be altogether useless to send the jury to inspect the premises for the purpose of enabling them to determine whether or not a vein is disclosed in the Pocket Liner shaft, when the parties making such request, as to one branch of their case, rested the validity of their own location upon its existence.

4. In the oral argument counsel for appellants conceded that, if it was not necessary for appellee to post a new notice at the point of the second and valid discovery of the Golden Rod vein in the Pocket Liner shaft made early in 1894, which the amended location certificate of the appellee recited, the Golden Rod location is superior to the Eulalia. In the case of The Treasury Tunnel M. & R. Co. *v.* Boss, decided at this term, we have substantially held that such posting was not necessary under such facts as exist here.

5. We desire further to say that the statement in appellants' petition that we have not applied the same principles of law to the
402 location of these two claims, in so far as they are based upon the discovery of mineral in the Pocket Liner shaft, is incorrect. The facts attending the two locations are not the same, as we have already said, hence the rule applicable to the one case is not the same that governs the other. The locators of neither lode posted at the point of discovery in the Pocket Liner shaft a location stake or notice, but the location of the Golden Rod, resting upon the discovery in the Pocket Liner shaft, is not only earlier in point of time, but its locators filed, and had recorded, an amended location certificate basing the location upon such discovery; while the locators of the Eulalia have never filed but one location certificate, and therein the statement is that the location is based upon a discovery which appellants now admit .s invalid because it is in the wash on the mountain side.

The petition for rehearing is denied, and the former opinion adhered to.

Rehearing denied.

(Endorsed:) Filed in supreme court, Dec. 7, 1903. Horace G. Clark, clerk.

And thereafter, on to-wit the 16th day of December, A. D. 1903, said appellants, as plaintiffs in error in the Supreme Court of the United States, filed in the supreme court of the State of Colorado their assignment of errors, which is in words and figures as follows, to-wit:

403 In the Supreme Court of the United States.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Plaintiffs in Error,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Defendant in Error.

Being entitled:

In the Supreme Court of the State of Colorado.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Appellants,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Appellee.
No. 4215.

Assignment of Errors.

And now comes the above named plaintiffs in error and for assignments of errors herein, say: That in the record and proceedings in said cause the supreme court of Colorado, and the district court of the fifth judicial district in and for the county of Lake and State of Colorado, committed manifest error to the injury of these plaintiffs in error in the following particulars in this, to-wit:

404 First. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado; that the plaintiffs in error were not entitled under section 2320 of the Revised Statutes of the United States to prove the discovery of and existence of a lode and vein of gold and silver ore within the limits of their Eulalia Lode mining location, antecedent to and prior to their location of said ground, upon the 30th day of May, A. D. 1893, and the recording of their location certificate upon June 17th, 1893, whether made and discovered by themselves or other parties; and that they knew and claimed, at the time of making their location, that there had been a discovery of a vein or lode within the limits of their location, and that the construction put upon that part of section 2320, of the Revised Statutes of the United States, which says:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located"

by the supreme court of Colorado, was adverse to and in opposition to the rights of plaintiffs in error under the said statute of the United States, and in direct contravention of plaintiffs in eror's express right, title, privilege and immunity, to prove the existence and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location;

That such construction of the evidence offered by the plaintiffs in error in the trial court, and the sustaining of the said ruling by the supreme court of Colorado, was in direct opposition to and not in accordance with the following decisions of the United States courts and the appellate courts of the other mining States, upon the same offer of evidence:

405 Book *v.* Justice Mining Co., 58 Fed. Rep. 106;
Jupiter M. Co. *v.* Bodie Cons. M. Co., 11 Fed. 666;
Nevada Sierra Oil Co. *v.* The Home Oil Co. 98 Fed. Rep. 673;
Erwin *v.* Perego, 93 Fed. Rep. 611;
Conway *v.* Hart, 129 Cal. 480, 62 Pac. 44;
Hayes *v.* Lavagnino, 17 Utah, 185, 53 Pac. Rep. 1020;
Werner *v.* McNulty, 7 Mont. 30, 14 Pac. Rep. 643;
O'Donnell *v.* Glenn, 8 Mont. 284, 19 Pac. Rep. 302.

Second. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing *Thomas H. Thompson*, witness for plaintiffs in error, and the former partner of Samuel McMillen, in the Pocket Liner Lode location, to answer the following question:

Q. "Will you state what you found in that shaft in the year 1879?"

That such ruling was adverse to and in contravention of plaintiffs in error's express rights, title, privilege, and immunity under section 2320 of the Revised Statutes of the United States, to prove the existence and discovery of a vein and lode of precious ores at any point and place within the surveyed and claimed limits of their location, and was at variance with the uniform rule and practice of the United States courts, and of the supreme courts of the mining States, in admitting evidence of this character.

Third. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing Steven Connors, witness for plaintiffs in error, and former owner in the Pocket Liner Lode location, to answer the following question:

Q. "Will you state, if you remember what were the contents, not the number of ounces—will you state whether that assay
406 showed the presence of gold and silver within that rock that you gave to the assayer?"

That such ruling was adverse to and in contravention of plaintiffs in error's express rights, title, privilege and immunity, under sec. 2320 of the Revised Statutes of the United States, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

Fourth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing George Holland, witness for plaintiffs in error, and a United

States deputy mineral surveyor at the date of the survey of the Eulalia Lode mining claim, May 30th, 1893, to answer the following question:

Q. "When you were at the Pocket Liner shaft was there anything said by any of the parties present, especially Mr. McMillen, one of your employers, as to the presence of mineral in that shaft?"

That said ruling was adverse to and in contravention of plaintiffs in error's express right, title privilege and immunity, under sec. 2320 of the Revised Statutes of the United States to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

Fifth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, as stated in folios 357, 358 and 359 abstract as follows:

407 "Mr. ELDER: The proposition of the plaintiffs is simply this; that Mr. McMillen as an owner and a locator of the Eulalia lode knew, at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with the co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground, claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States, and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc. etc. etc.

"The COURT: I cannot agree with you. Our statute is clear as to what is required and it has become almost elementary. You must go either upon the vein and make your discovery, or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained."

That the prohibition of the trial court, excluding all testimony of the existence of a vein and lode at any other point within the limits of their Eulalia location at the date of location unless shown in their surveyed discovery shaft, and the court's construction of the statute of Colorado, act of February 13th, 1874, General Laws of Colorado 1883, section 2401, was in direct conflict with the requirements of section 2320 of the United States Statutes. That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of, and against the title, right, privilege and immunity claimed by plaintiffs in error under section 2320, United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the
408 surveyed and claimed limits of their location.

Sixth. That the supreme court of Colorado erred in sustain-

ing the ruling of the district court of Lake county, in refusing to give instruction No. two asked by plaintiffs in error, as follows:

"The court further instructs the jury that although a discovery of mineral in rock in place is a necessary pre-requisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued this would make his location a valid and legal one."

Seventh. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. four asked by plaintiffs in error, as follows:

"The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz, or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator before the location was made of the existence of mineral.

"And under section 2320, Revised Statutes of the United States, the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location, there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location even though the discovery was first made by some one other than the locator."

Eighth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. five asked by plaintiffs in error, as follows:

409 "The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location.

It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, but it must be known to him and claimed by him in order to give validity to the location."

Ninth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. 8 asked by plaintiffs in error, as follows:

"The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January, A. D. 1894, the plaintiffs, or their grantors, were in the quiet and undisputed possession of the premises designated in the complaint as the 'Eulalia lode,' claimed by the defendant as the 'Golden Rod lode;' that upon May 30th, 1893, long prior to said 25th day of January, A. D. 1894, plaintiffs or their grantors posted on the surface a plain sign or notice containing the name, 'the Eulalia lode,' the name John Kennedy, the locator, and the 30th day of May

1893, the date of location; that the plaintiffs or their grantors so marked the boundaries of said Eulalia Lode mining claim by the erection of six substantial stakes hewed or marked on the sides in toward the claim and sunk in the ground, one at each corner and one at the center of each side line so as to be readily traced, and that on or about June 17, 1893, and within ninety days of said 30th day of May, A. D. 1893, the said plaintiffs duly recorded a location certificate containing the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface; *and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock, in place, bearing gold, silver, or other precious metals; then this constitutes a prima facie* case for the plaintiffs which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture and the acquisition of a better right or title by the defendant and its grantors."

410 Tenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado; that the plaintiffs in error were not entitled under section 2320 of the Revised Statutes of the United States, to prove that in September, October, November and December, 1894, appellants drove a drift from the workings of the Little Vinnie Lode mining claim at a point 380 feet from the surface of the earth, into the southeast fraction of their Eulalia claim, a distance of over 64 feet, and also constructed and opened certain upraises and stopes within the limits and boundaries of their Eulalia Lode claim as surveyed; and that in these workings and developments, within the limits of their Eulalia location, they discovered, disclosed and opened a large and valuable vein of gold and silver bearing ore in rock in place, and from this vein shipped large quantities of gold and silver bearing ore to the smelters.

That such ruling and construction of the statutes of Colorado, upon the objection of the defendants, was in direct conflict with the requirements and provisions of section 2320 of the United States Statutes. That under such construction and ruling, the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error under section 2320 United States Statutes, to prove the exist-

411 ence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation of the rights of plaintiffs in error, not only under section 2320 of the United States

Statutes, but also in contravention of their vested rights under section 7, page 127, of the General Laws of 1874, of the Territory of Colorado, which is section 2403, page 723, General Statutes of Colorado 1883, which reads as follows:

"Any open cut, cross-cut or tunnel which shall cut a lode at the depth of 10 feet below the surface, shall hold the same as if a discovery shaft were sunk thereon, or an adit of at least 10 feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

and that such ruling was adverse to the construction of section 2403, Laws of 1883, given and rendered by the supreme court of Colorado in

Hall *v.* Kearney, 18 Colo., 505;
Brewster *v.* Shoemaker, 28 Colo. 176.

Eleventh. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the map and testimony of W. L. G. Smith, of the drift, stopes, and upraises, and the vein of gold and silver ore found therein, opened and constructed by plaintiffs in error from the 380 foot level of the Little Vinnie lode into their Eulalia lode,—see folios 321–331 of abstract, as follows:

"W. L. G. Smith, mining engineer, in October, November and December 1894, and January 1895. I was employed by Ronald Morrison about that time to survey along the lines of the Little Vinnie lode, what is known as the Eulalia lode, I have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode.

412 Q. Have you such a map?

A. Yes.

Q. Is this the map, sir?

Mr. CAVENDER: I object to that. It appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to re-locations.

Mr. ELDER: Second. We offer that in case of the working of the Eulalia lode and the shipping of ore, or the discovery of mineral in either the drift or the stopes above the drift during the period of the year 1894, that would be a sufficient discovery of mineral, in the failure of a discovery by other parties prior to that period of time and that such a discovery would inure to and relate back to the original location of this claim upon the ground.

The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery, you must in some way show that it was accessible from the ground claimed by you, and on which it was intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground, which would have made or constituted visible notice to somebody intending to locate, that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

The COURT: I hold most emphatically this, that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.

Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

The COURT: There was nothing as far as I see the evidence now; I may be mistaken. This particular part which you point out, which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Per-
413 haps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist 300 or 400 feet underground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery, to constitute a discovery.

Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property?

The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift, for the purpose of establishing a discovery on the Eulalia ground, unless you show an opening or visible connection with the surface of the Eulalia ground, which would have constituted notice to any one intending to locate the same.

Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the underground workings of the Little Vinnie claim?

The COURT: Unless you can show an opening to the surface of the Eulalia claim.

To which ruling of the court, plaintiffs by their counsel then and there duly excepted."

That such ruling and construction of the statutes of Colorado, upon the objection of defendants, was in direct conflict with the re-

quirements and provisions of section 2320 of the United States Statutes;

That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874 is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the
414 title, right, privilege and immunity claimed by plaintiffs in error, under section 2320 United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation of the rights of plaintiffs in error, not only under section 2320 of the United States Statutes but also in contravention of their vested rights under section 7, page 127 of the General Laws of 1874 of the Territory of Colorado, which is section 2403, page 733, General Statutes of Colorado 1883, which reads as follows:

"Any open cut, cross-cut, or tunnel which shall cut a lode at the depth of 10 feet below the surface, shall hold such lode the same as if a discovery shaft were sunk thereon, or an adit of at least 10 feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

And that such ruling was adverse to the construction of section 2403, Laws of 1883, given and rendered by the supreme court of Colorado in:

Hall *v.* Kearney, 18 Colo. 505;
Brewster *v.* Shoemaker, 28 Colo. 176.

Twelfth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the testimony of M. N. McInnis, miner, of the drift, stopes, and upraises made and constructed by plaintiffs in error, and the vein of gold and silver ore found therein, discovered and disclosed by appellants from the 380 foot level of the little Vinnie Lode into their Eulalia lode,—see folios 335, 336, 337, of abstract, as follows:
415 "M. N. McInnis, miner: Have mined upon Breece hill,—mined on the Little Vinnie in December 1894,—am familiar with the underground workings of the Little Vinnie, yes, sir, part of it; am familiar with what is known as the 380 foot level of the Little Vinnie.

Q. Do you know of any work having been done from that level towards the Eulalia Lode claim in the fall?

A. We have an upraise; we have a stope there in that level.

Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

Objected to by defendant.

The Court: What is the purpose of it?

Mr. Elder: We are going to prove we shipped ore from that ground.

The COURT: They will perhaps admit that you did.

Mr. EWING: No, we will not admit that; but this comes under the same objection. And the court sustained such objection. The court has already decided that such a drift does not constitute a discovery.

To which ruling of the court plaintiffs, by their counsel, duly excepted."

That such ruling and construction of the statutes of Colorado, upon the objection of defendants, was in direct conflict with the requirements and provisions of section 2320 of the United States Statutes.

That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the title, right, privilege and immunity claimed by plaintiffs
416 in error, under section 2320, United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation and contravention of their vested rights under section 7, page 127, of the General Laws of 1874 of the Territory of Colorado, which is section 2403, page 733, General Statutes of Colorado, 1883.

Thirteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the testimony of W. L. G. Smith and M. N. McInnis, as stated in assignment of error No. 5, as follows: (See folio 727)

"5. The court erred in holding that the United States statutes and the statutes of Colorado required plaintiffs to show an opening or openings within the lines of their Eulalia claim from any vein, lode or ledge discovered by them within the limits of their Eulalia claim to the surface of the earth, before the plaintiffs could claim and prove a discovery of such vein, lode or ledge from, by or through workings having their only openings on territory outside the limits of their Eulalia Lode claim."

That such ruling and decision of the supreme court of Colorado is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error under section 2320 United States Statutes, to prove the existence, and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

Fourteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. nine asked by plaintiffs in error, as
417 follows:

"The court instructs the jury that if they believe from the evidence that no lode, ledge or vein of quartz or other rock in place,

bearing gold, silver or other precious metals had been disclosed and discovered in the discovery shaft of the Eulalia lode, or in the shaft known as the Pocket Liner shaft, prior to the location of the Eulalia lode upon the 30th day of May 1893, either by the plaintiffs herein, their grantors or some of them, or by third parties with the knowledge of such discovery by plaintiffs herein, their grantors or some of them, and if they believe further from the evidence that no lode, ledge, or vein of quartz or other rock in place, bearing gold, silver or other precious metals, had been disclosed and discovered in the Golden Rod discovery shaft, or in the shaft known as the Pocket Liner shaft, by the defendant or its grantors. And if the jury believe from the evidence that the plaintiffs herein, their grantors or some of them, discovered a vein, lode or ledge of quartz or other rock, in place, bearing gold, silver or other precious metals, at a depth greater than ten feet below the surface of the earth in the part or portion of said premises as designated by them as the southeast Eulalia fraction, prior to any other discovery by defendant or its grantors, you are instructed that such discovery by plaintiffs relates back to the time of the original survey and location of the said Eulalia lode, and enables the plaintiffs and their grantors to hold the claim against all who had not acquired interests in the lode and premises at the time the acts were performed, and your verdict will then be for the plaintiffs."

Fifteenth. That the supreme court of Colorado erred in refusing to consider and pass upon assignments of error Nos. 2, 3, 4, 8, 10, 11, 12, and 13 of plaintiffs in error.

Sixteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in excluding every offer of evidence made by plaintiffs in error, in support of their title and in refusing to give every instruction asked by plaintiffs in error; and in admitting every offer of evidence made by defendants in error in support of their title, and in giving each and every
418 instruction to the jury asked by defendants in error.

Seventeenth. That the supreme court of Colorado erred in assuming that plaintiffs in error did not upon May 30th, 1893, claim all the veins and lodes in the ground included within the boundaries and limits of their Eulalia Lode mining claim, and claimed each and every vein in those limits, whether the one some of their number opened and discovered in 1879 and 1880 in the Pocket Liner shaft, the ore and crevice material shown on the dump of the Winter discovery shaft, less than forty feet from their Eulalia discovery shaft, or the vein and deposit from which tons upon tons of pay ore were shipped from their opening into the southeast Eulalia fraction from the 380 foot level of the Little Vinnie lode from between the porphyry and quartz contact found at that point, and the admitted fact of their prior location of eight months and their prior record of their location certificate, and their prior possession and occupation of the ground, forever disproves this assumption of the court.

That the refusal of the court to allow this evidence to go to the jury was in contravention of the title, right, privilege and immunity claimed by plaintiffs in error under section 2320 United States Statutes.

Eighteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in establishing the mineral land title in the junior locator of two mining locations where, as appears by the evidence, both discovery shafts were
419 sunk in the wash and were but four feet apart, and neither of them were sunk over a depth of twelve feet, and in permitting the junior locator to introduce evidence of a vein or lode in some other part and portion of the ground, and in refusing such privilege to the senior locator.

Nineteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in allowing defendants in error to prove the presence or discovery of a vein or lode at another point in their location than the one at which they posted their discovery notice, and where they claimed their original discovery shaft, and in refusing the same privilege and opportunity to plaintiffs in error.

Twentieth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in permitting evidence of the third amended location certificate, dated March 8th, 1895, of defendants in error, changing their discovery shaft from a point three hundred and seventy-five (375) feet from their east end line to a point over one thousand (1,000) feet west of their first discovery, and no proof being submitted of their placing of a new discovery notice at this new discovery shaft, the same being filed long after the discovery, opening up and shipping by plaintiffs in error of pay ore from their opening along the side line of the Little Vinnie lode at its 380 foot level, and while defendants in error were still claiming by their second amended location certificate, filed Dec. 12th, 1894, their original discovery shaft as their point of dis-
420 covery. There is no provision of the statutes of the United States or of the statutes of Colorado by which an invalid discovery of mineral can be cured by the record of an amended or additional location certificate.

Twenty-first. The supreme court of Colorado erred in confusing the facts of this case in its second opinion, upon the denial of plaintiffs in error's motion for rehearing, in assuming that defendants in error made any claim whatever as the basis of their title to the only vein in the Pocket Liner shaft, discovered by Samuel McMillen and his associates in that shaft in 1879 and 1880, at the depth of from 90 to 114 feet, but their evidence and claim of title was based only and solely upon what they claimed to be six separate and distinct veins in their east drift, forty-five feet long, at a depth of 135 feet in the same shaft, and which their own witness and lessee, Thomas Slavin, testified were not veins at all, and only cracks and selvedges in the porphyry.

Twenty-two. The supreme court of Colorado erred in sustaining the judgment of the district court of Lake county, while admitting errors of law in the admission and exclusion of evidence in both of their opinions, because the same were against the law and the facts.

Twenty-three. That the supreme court of Colorado erred in sustaining the instruction No. six, given to the jury as asked by defendants in error against the exceptions of the plaintiffs in error, as follows.

421 "The court further instructs the jury that under the pleadings and evidence in this cause, the plaintiffs cannot recover, and the sole issue presented to the jury is as to whether the defendant or its grantors have made a valid discovery and location upon the Golden Rod claim and performed the necessary work thereon."

Twenty-four. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to send the jury to the ground to inspect the premises as requested by plaintiffs in error.

Twenty-fifth. That the supreme court of Colorado erred in not reversing the judgment herein, instead of affirming the same.

Wherefore, the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment of said supreme court of the State of Colorado.

GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

(Endorsed :) No. —. United States of America. In the Supreme Court of the United States. Samuel McMillen *et al.*, plaintiffs in error, *vs.* The Ferrum Mining Company, defendant in error. Assignment of errors to the judgment of the supreme court of Colorado. George R. Elder, attorney for plaintiffs in error. Filed in supreme court Dec. 16 1903. Horace G. Clark, clerk.

422 And thereafter, on to-wit the 16th day of December, A. D. 1903, said appellants, as plaintiffs in error in the Supreme Court of the United States, filed in the supreme court of the State of Colorado their petition for writ of error from the judgment of the supreme court of Colorado, which petition is in words and figures as follows, to-wit:

423 In the Supreme Court of the United States.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Plaintiffs in Error,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Defendant in Error.

Being entitled

In the Supreme Court of the State of Colorado.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Appellants,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Appellee.
No. 4215.

424 *Petition for Citation for Writ of Error to the Supreme Court of the United States.*

To the Honorable John Campbell, chief justice of the supreme court of Colorado:

And now comes the above entitled plaintiffs in error, and say that there is manifest error in the record and proceedings herein, of which the Supreme Court of the United States has jurisdiction, as shown by an assignment of errors filed herein, and prays that a writ of error be allowed, commanding the said supreme court of the State of Colorado to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States; and the said plaintiffs in error further pray that, upon filing a bond for damages and costs in the sum of five thousand dollars ($5,000), an order be entered that said writ of error shall issue until further order of the Supreme Court of the United States in the premises.

GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

425 (Endorsed:) No. — United States of America. In the Supreme Court of the United States. Samuel McMillen *et al.*, plaintiffs in error, *vs.* The Ferrum Mining Company, defendant in error. Petition for writ of error from the judgment of the supreme court of Colorado. George R. Elder, attorney for plaintiffs in error. Filed in supreme court Dec. 16, 1903, Horace G. Clark, clerk.

And on the same day, to-wit, on the 16th of December, A. D. 1903, said appellants, as plaintiffs in error in the Supreme Court of the United States, filed in the supreme court of the State of Colorado their bond on writ of error and appeal to the Supreme Court of the United States, which said bond is in words and figures as follows, to-wit:

426 Know all men by these presents, that we, Ronald Morrison, Eben Smith and the Estate of Samuel McMillen, Dec'd, as principals, and George R. Elder, as surety, are held and firmly bound unto the Ferrum Mining Company in the full and just sum of five thousand ($5,000.00) dollars, to be paid to the said The Ferrum Mining Company, their certain attorney, successors and assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 16th day of December, in the year of our Lord one thousand nine hundred and three,—1903.

Whereas, lately at a term of the supreme court of the State of Colorado, in a suit pending in said court between Samuel McMillen, Ronald Morrison and Eben Smith, plaintiffs in error, and The Ferrum Mining Company, defendants in error, a judgment was rendered against the said Samuel McMillen, Ronald Morrison and Eben Smith; and the said Samuel McMillen, Ronald Morrison and Eben Smith having obtained a writ of error, issued by the Honorable John Campbell, chief justice of the supreme court of Colorado to reverse the judgment in the aforesaid suit and a citation directed to the said The Ferrum Mining Company, citing and admonishing it to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof.

Now the condition of the above obligation is such, that if the said Samuel McMillen, Ronald Morrison and Eben Smith shall prosecute said writ of error to effect and answer all damages and costs, interest &c., for the delay, if they fail to make their plea
427 good, then the above obligation to be void; else to remain in full force and effect.

(Signed) RONALD MORRISON, [SEAL.]
By his attorney, GEORGE R. ELDER.
" EBEN SMITH, [SEAL.]
By his attorney, GEORGE R. ELDER.
" THE ESTATE OF SAMUEL McMILLEN, DECEASED,
By its attorney, GEORGE R. ELDER. [SEAL.]
GEORGE R. ELDER. [SEAL.]

Approved by

JOHN CAMPBELL,
Chief Justice of the State of Colorado.

Dec. 16th, 1903.—We hereby consent to the above bond as signed and approve the security.

(Signed) CHAS. CAVENDER,
" JOHN A. EWING,
Counsel for Defendants in Error.

(Endorsed:) No. —. In the Supreme Court of the United States. Samuel McMillen *et al.*, plaintiffs in error, *vs.* The Ferrum Mining Company, defendant in error. Bond on writ of error and appeal to Supreme Court of the United States. George R. Elder, attorney for plaintiffs in error. Filed in supreme court Dec. 16, 1903. Horace G. Clark, clerk.

428 And on the same day, to-wit the 16th day of December, A. D. 1903, said appellants, as plaintiffs in error in the Supreme Court of the United States, filed in the supreme court of the State of Colorado, a citation for writ of error, which is in words and figures as follows, to-wit:

429 UNITED STATES OF AMERICA, }
State of Colorado. }

In the Supreme Court of the United States.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Plaintiffs in Error,
vs.
THE FERRUM MINING COMPANY, a Corporation, etc., Defendant in Error.

To the Ferrum Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error allowed by the supreme court of the State of Colorado to the Supreme Court of the United States, wherein Samuel McMillen, Ronald Morrison, and Eben Smith are plaintiffs in error, and you, The Ferrum Mining Company, a corporation, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, this 16th day of December, A. D. 1903.

(Signed) JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

430 (Endorsed:) No. — In the Supreme Court of the United States. Samuel McMillen *et al.*, plaintiffs in error, *vs.* The Ferrum Mining Company, defendant in error. Citation for writ of error to Supreme Court of the United States. George R. Elder, attorney for plaintiffs in error. Filed in supreme court Dec. 16 1903 Horace G. Clark, clerk.

And afterwards on to-wit the 14th day of January, A. D. 1904, was filed in the supreme court of the State of Colorado proof of service in the above entitled cause, which is in words and figures as follows, to-wit:

431 *Proof of Service.*

THE UNITED STATES OF AMERICA, } ss:
State of Colorado, }

SAMUEL MCMILLEN ET AL., Plaintiffs in Error,
vs.
THE FERRUM MINING COMPANY, Defendant in Error.

On this 13th day of January, A. D. 1904, Charles Cavender, John A. Ewing, and Francis E. Bouck, counsel for defendant in error, The Ferrum Mining Company, hereby acknowledge that they have received a true copy of the foregoing citation and duly accept service thereof as the attorneys of record of the said The Ferrum Mining Company.

(Signed) CHAS. CAVENDER,
" JOHN A. EWING,
" FRANCIS E. BOUCK,
Attorney- for Defendants in Error.

(Endorsed:) No. — The United States of America. State of Colorado. Samuel McMillen *et al.*, plaintiff- in error, *vs.* The Ferrum Mining Company, defendant in error. Proof of service. George R. Elder, attorney for pl'fs in error. Filed in supreme court Jan. 14 1904 Horace G. Clark, clerk.

432 And upon to-wit the 16th day of December, A. D. 1903, was filed in the supreme court of the State of Colorado an order of allowance of writ of error in the above entitled cause, which order is in words and figures as follows, to-wit:

433 UNITED STATES OF AMERICA, }
State of Colorado. }

In the Supreme Court of the State of Colorado.

SAMUEL MCMILLEN, RONALD MORRISON, and EBEN SMITH, Appellants, *vs.* THE FERRUM MINING COMPANY, Appellee. } No. 4215.

Upon presentation of the petition and assignments of error of Samuel McMillen, Ronald Morrison and Eben Smith, plaintiffs in error, for a writ of error in the above entitled case to the Supreme Court of the United States, the said petition is hereby granted and it is ordered that a writ of error be allowed to the Supreme Court of the United States, the bond in the penal sum of five thousand dollars herewith presented being approved.

In testimony whereof, witness my hand this 16th day of December, A. D. 1903.

(Signed) JOHN CAMPBELL,
Chief Justice of the State of Colorado.

(Endorsed :) No. 4215 In the supreme court of the State of Colorado. Samuel McMillen *et al.*, appellants *vs.* The Ferrum Mining Company, Order of allowance of writ of error to Supreme Court of the United States. George R. Elder, attorney for plaintiffs in error. Filed in supreme court, Dec. 16 1903 Horace G. Clark, clerk.

434 And afterwards, on to-wit, the 17th day of December, A. D. 1903 the clerk of the United States circuit court filed in said supreme court of the State of Colorado a writ of error in said cause, which said writ is in words and figures as follows, to-wit:

435 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Samuel McMillen, Ronald Morrison and Eben Smith, appellants, and The Ferrum Mining Company, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under,

said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Samuel McMillen, Ronald Morrison, and Eben Smith, appellants, as by their complaint appears:

436 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

In testimony to the above, I do hereunto sign my name [SEAL.] and affix the seal of said court, at the city and county of Denver, in said district, this 17th day of December, A. D. 1903.

(Signed) ROBERT BAILEY,
Clerk United States Circuit Court.

437 *Return.*

THE UNITED STATES OF AMERICA, }
State of Colorado, } ss:

In obedience to the command of the within writ of error I herewith transmit to the honorable, the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said supreme court of the State of Colorado at Denver, this 14th day of January, A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of Colorado.

438 UNITED STATES OF AMERICA, }
State of Colorado, City and County of Denver, } ss:

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify the above and foregoing pages numbered in folios from 1 to 945 both inclusive, to be a true, perfect and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court,—transcript of record, bill of exceptions, judgment of supreme court, opinion of supreme court, petition for rehearing, judgment supreme court denying same, opinion supreme court denying petition for rehearing, assignment of errors, petition for writ of error, bond, citation for writ of error, allowance of writ of error, writ of error, proof of service, in a certain cause lately in said court pending wherein Samuel McMillen, Eben Smith and Ronald Morrison were appellants and The Ferrum Mining Company was appellee, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at Denver in said State of Colorado, this 14th day of January, A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of Colorado.

Endorsed on cover: File No. 19,226. Colorado supreme court. Term No. 185. Samuel McMillen, Ronald Morrison, & Eben Smith, plaintiffs in error, *vs.* The Ferrum Mining Company. Filed February 1st, 1904. File No. 19,226.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 185.

SAMUEL McMILLEN, RONALD MORRISON, AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15143

SUPREME COURT OF THE UNITED STATES.

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vs.

THE FERRUM MINING COMPANY, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This was an adverse ejectment suit brought November 20, 1897, by plaintiffs in error in the district court of the fifth judicial district in Lake county, Colorado, as the owners of the Eulalia Lode mining claim, in support of their adverse claim, filed in the United States land office at Leadville, October 21, 1897, against the application for patent by the defendant in error for the Golden Rod Lode mining claim.

The case was tried February 7 and 8, 1900, resulting in a verdict and judgment in favor of defendant in error (R., 3 and 4).

An appeal was taken to the supreme court of Colorado by plaintiff in error, and the judgment was affirmed December 7, 1903 (R., 402).

That afterwards and upon February 1, 1904, the case was brought by writ of error to the Supreme Court of the United States (R., 438).

The assignment of errors appears on folios 403 to 421, Record.

The Eulalia Lode mining claim was located upon May 30, 1893, in the name of John Kennedy, by Samuel McMillen, one of the plaintiffs in error, and John McCombe, the location certificate of the Eulalia claim being recorded June 17, 1893 (R., fols. 149–150). It consisted of three fractional parts of a full mining claim, separated one from the other by a space of 300 and 400 feet (plat, R., fol. 144), designated in said adverse plat as tracts A, B, and C.

Tract A.—Area, 0.165 A.

Tract B.—Area, 1.074 A.

Tract C.—Area, 2.001 A.

The ground embraced in the Eulalia Lode mining claim was the abandoned and forfeited territory inclosed within the lines of the Winter lode, United States survey No. 427, application No. 279, and the surveyed lines of the said Eulalia lode were identical with the lines of the Winter lode in its plat as approved by the surveyor general of Colorado in its application for United States patent June 25, 1879. This application for patent for the Winter lode was cancelled by order and finding of the honorable Commissioner of the General Land Office after protest and hearing had of John Kennedy, locator and owner of the Eulalia lode, *vs.* W. E. Johnston *et al.*, owners of the Winter lode, by letter dated February 24, 1896 (Mineral Law Digest, Kennedy *vs.* Johnston, pp. 96, 135, 216, 227, 245, and 309).

The ground inclosed within the Winter lode had also been included within the lines of numerous former lode mining locations for thirteen or fourteen years prior to

the 30th of May, 1893, most of such locations being prior to 1880. The names of some of these claims were the Pocket Liner lode, the Robert Burns lode, the Glengary lode, the Pennsylvania lode, the Eclip lode, the Little Winnie lode, the Comstock lode, the Lowland Chief lode, the Highland Chief lode, the Carlton lode, the Badger Girl lode, and the Howland lode. It is undisputed that the ground embraced in the Eulalia Lode location had been, long previous to May 30, 1893, located and worked as mining ground, and so held by other parties, as well as the Winter and Pocket Liner owners.

It is further undisputed and incontestible that the owners of the Winter lode found in their discovery shaft located on tract B, adverse plat (plat, R., fol. 144), over 200 feet deep in 1879 and 1880, mineral in place, and that such mineral is in sight on the dump of the Winter shaft in March, 1905; that this discovery shaft of the Winter lode is less than 30 or 40 feet distant from the original discovery shaft of the Eulalia lode, as well as the Golden Rod shaft.

It is further undisputed and incontestible that the owners of the Pocket Liner lode found in their discovery shaft located on tract C, adverse plat (plat, R., fol. 144), in the years 1879 and 1880, mineral in place at a point from 90 feet to 127 feet down that shaft (see testimony of Charles Slavin, witness of defendant in error, R., pp. 171–177, fol. 277 to 286), and that such mineral and quartz is in sight on the dump of the Pocket Liner shaft in March, 1905. These facts were publicly known at the time the Eulalia lode was located, and especially to Samuel McMillen, one of the plaintiffs in error and a former owner in the Pocket Liner lode; in fact and in truth his money, work, and effort contributed to the actual discovery of the ore vein in the Pocket Liner shaft in the years 1879 and 1880.

The Golden Rod lode, claimed by defendant in error, The Ferrum Mining Company, was located January 25, A. D. 1894, by Robert B. Estey and Charles T. Limberg, grantors

of defendant in error, upon and within the same identical premises. Their location certificate was recorded January 29, 1894 (R., fol. 184, pp. 110, 111).

It is undisputed that the discovery shafts of the Eulalia lode and the Golden Rod lode were both located at a point from 400 feet to 425 feet west of the east end line of the claims and within a distance of three or four feet of one another, (evidence W. L. G. Smith, witness for defendant in error, R., fol. 190, p. 114; R., fol. 149, p. 89, location certificate Eulalia lode; also R., fol. 184, pp. 110, 111, location certificate Golden Rod lode).

In the Eulalia location certificate (R., fol. 149, p. 89), the following description locates the place of its discovery shaft:

"425 feet running S. 77° 30′ E. from center of discovery shaft, and 1075 feet running N. 77° 30′ W. from center of discovery shaft."

In the Golden Rod location certificate (R., fol. 184, p. 110), the following description locates the place of its discovery shaft:

"1100 feet running N. 77° 30′ W. from center of discovery shaft and 400 feet running S. 77° 30′ E. from center of discovery shaft."

Neither shaft was sunk to exceed a depth of twelve or fourteen feet, and neither the plaintiffs in error nor the defendant in error made claim and introduced evidence in the case that mineral in place had been discovered in either one of said discovery shafts, and the admitted fact was that neither shaft had passed through or below the wash and alluvial debris usually encountered upon Breece hill, in the Leadville mining district (evidence W. L. G. Smith, witness for defendant in error, R., fols. 189 and 190, p. 114).

The undisputed evidence was that the discovery notices for both the Eulalia lode, the claim of plaintiffs in error and the Golden Rod lode, the claim of defendant in error

were placed and posted at these two twelve-foot holes designated by them as their original discovery shafts, and that no other or different notices or discovery stakes were ever placed at any other point upon the surface of these two contested claims by either the plaintiffs or the defendant (R., fol. 187, p. 112, evidence W. L. G. Smith, for defendant; R., fol. 139 p. 83, evidence George Holland, for plaintiff).

It is further established that on the 14th day of December, 1894, the defendant in error, The Ferrum Mining Company, filed an additional and amended location certificate establishing their discovery shaft at practically the same point as the one filed January 29, 1894 (R., fol. 290, pp. 179–180).

That defendant in error in said additional and amended location certificate described the place of location of their discovery shaft to be December 14, 1894, as follows (R., fol. 290, p. 179):

"1100 feet running N. 77° 31′ W. from center of discovery shaft and 400 feet running S. 77° 30′ E. from center of discovery shaft, said discovery shaft being situate upon said lode, vein, ledge or deposit."

That afterwards and upon March 8, 1895, defendant in error filed a second additional and amended location certificate establishing, for the first time and without posting a notice of discovery or doing any additional discovery work, a new discovery shaft at a point nearly 800 feet west of their original discovery shaft, and at the very shaft used by Samuel McMillen as the discovery shaft of the Pocket Liner lode in 1879 and 1880 (R., fols. 293–294, pp. 181 and 182).

The description identifying this change of base as to their discovery shaft was as follows:

"363.45 feet running N. 71° 11′ W. from center of discovery shaft and 391.15 feet running S. 83° 51′ E. from center of discovery shaft and thence running S. 77° 45′ E. 450 feet and thence S. 66° 25′ E. 254.97 feet."

The purpose, as stated in the certificate, was as follows:

"For the purpose of correcting any errors in the original location, description or record and of taking in and acquiring all forfeited or abandoned overlapping ground and of taking in any part of any overlapping claim which has been abandoned or cancelled and of securing all the benefits of said section 2409 of the General Statutes of Colorado" (R., fol. 294, p. 182).

Plaintiffs in error title to the Eulalia lode was based upon the following positions:

First. That upon the 30th day of May, A. D. 1893, Samuel McMillen, one of the locators and owners of the Eulalia Lode mining claim and one of the plaintiffs in error, had prior to that date discovered, within the limits of his said location, the Eulalia lode, a vein and lode of mineral bearing gold and silver, and knew at the time of making his location upon the said 30th of May, A. D. 1893, and claimed by such staking, location work, and recording of a location certificate thereof, that there had been a discovery of a vein or lode within the limits of his location; that this vein and lode then existed and was disclosed in what has been termed in this suit the Pocket Liner shaft, a shaft sunk by Samuel McMillen and his co-owners of the Pocket Liner lode, in the years 1879 and 1880, to a depth of 125 or 130 feet; that at a point 75 or 80 feet from the surface a vein and lode of gold and silver bearing ore was disclosed and opened by the said Samuel McMillen and his co-owners, which was over a foot thick, with distinct walls in rock in place, having a course 61 degrees east and dipping 69 degrees to the west, passing out of said shaft at a point about 120 feet from the surface, and that the said Samuel McMillen sunk his said shaft in 1879 and 1880, below the point where said vein passed out of the western side of his shaft; that the said Pocket Liner shaft was situated some 750 or 800 feet west of the point on the surface of the Eulalia lode where

the discovery stake and notice of discovery were placed by the said Samuel McMillen and his co-locators of the Eulalia lode upon the 30th day of May, 1893, and that said Pocket Liner shaft and the vein disclosed and discovered therein was, were, and are within the lines and limits of the Eulalia lode, and that said discovery was claimed by the said McMillen as his discovery of the Eulalia lode; that the title of the Pocket Liner lode had lapsed and become forfeited for failure to do the annual labor by the owners thereof, and that on the 30th day of May, 1893, the territory contained within the lines and limits of the said Eulalia lode was unappropriated and vacant mineral land of the United States.

Second. That during the summer and fall of the year 1894 the plaintiffs in error, Ronald Morrison and Samuel McMillen, opened, disclosed, and discovered by drifts, upraises, and stopes from the 380-foot level of the Little Vinnie Lode mining claim, a lode claim adjoining the Eulalia Lode mining claim upon the east, a vein, lode, and ledge of gold and silver bearing ore within the limits of the Eulalia Lode mining claim, and shipped therefrom large quantities of valuable gold and silver bearing ores; that said mineral and ores were taken from a vein, lode, and ledge of mineral in rock in place within the limits of the Eulalia Lode mining claim and at a point over 10 feet below the surface of said claim, viz., being three hundred and eighty (380) feet from the surface of the earth, ore shipped from the said vein or lode containing five and four-tenths ounces (5.4 oz.) silver and one ounce (1 oz.) gold per ton, gross value twenty-two and six-hundredths dollars ($22.06) per ton. See smelter sheet, Plaintiffs' Exhibit 10 (R., fol. 101, p. 61); also Plaintiffs' Exhibit No. 1 (R., fol. 75, p. 46); see ore stopes and drifts in tract A, southeast fraction Eulalia lode, underground plat, Exhibit No. 24 (R., fol. 153, pp. 92–93), said discovery having been made by plaintiffs in error in the months of October, November, and December, 1894, while

defendants in error were still claiming their discovery in their original discovery shaft by their location certificates recorded respectively January 29, 1904, and December 14, 1904, and over four months before their claim of a discovery at a different point by location certificate March 8, 1895.

Third. That during the summer and fall of the year 1895, while in the performance of the annual labor upon the Eulalia Lode mining claim, these plaintiffs in error drove a drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface not less than 10 feet in length, and that said drift was driven upon a vein, lode, and ledge of mineral bearing gold and silver, having well-defined walls of rock in place; that this was and is the same vein discovered, opened, and disclosed by the said Samuel McMillen and his co-owners when the said Pocket Liner shaft was first sunk, and is the same vein known and claimed by him to have been discovered and existing upon the 30th day of May, 1893, the date he set the first stakes and discovery notice of the said Eulalia Lode mining claim.

Fourth. That during the year 1898 plaintiffs in error continued their drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface a distance of over 10 feet upon the same vein, lode, and ledge of mineral bearing gold and silver in rock in place.

Fifth. That during the year 1899 plaintiffs in error continued their drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface to a distance of 39 feet from the shaft upon the same vein, lode, and ledge of mineral bearing gold and silver.

It is hardly necessary to state that the trial court absolutely and positively refused to allow plaintiffs below to introduce any evidence whatever to the jury sustaining any one of the five positions claimed as the basis for their title.

Defendant in error's title to the Golden Rod lode was based upon the following statement:

First. That upon the 25th day of January, A. D. 1894,

Charles T. Limburg and Robert B. Estey entered upon the premises in dispute and sunk a discovery shaft to a depth of 10 or 11 feet within four feet of the discovery shaft of the Eulalia lode, calling their claim the Golden Rod lode, and placing their discovery notice at that point, recording their location certificate January 29, 1894; that upon the 30th day of January, 1894, the said Limburg and Estey leased to Messrs. Charles Slavin and Thomas Walsh, who had been in possession of the shaft known as the Pocket Liner shaft from January 22, 1894, the Golden Rod lode; that the lessees during the year 1894 sank the said Pocket Liner shaft 150 feet deeper, making it in all 280 feet deep, without finding any vein or mineral in its farther depth, and drove a drift in a southeasterly direction from the said Pocket Liner shaft at a depth of 130 feet from the surface, the drift being 45 feet in length, and claimed to have discovered no less than six veins, lodes, and ledges of mineral bearing gold and silver in rock in place in said drift, their positions and descriptions being as follows:

A. Designated as vein No. 1, four feet from the southeast edge of the shaft, running north 30 degrees east, dipping 70 degrees west, with both walls porphyry an inch to an inch and one-half wide, sample assaying .5 ounce silver and .02 ounce gold.

B. A vein six feet from the edge of the shaft, material assaying 7 ounces silver, .03 ounces gold.

C. A vein fifteen or sixteen feet from the shaft, running north, with both walls porphyry, from one-fourth ($\frac{1}{4}$) of an inch to one-half ($\frac{1}{2}$) of an inch thick.

D. Designated as vein No. 2, nineteen feet from the edge of the shaft, running northwest and southeast, dipping north 61 degrees east, both walls porphyry, an inch to an inch and one-half wide, sample assaying 0.5 ounces silver, 0.02 ounces gold.

E. Designated as vein No. 3, forty-one feet from the edge of the shaft, running in a northerly direction, dipping to the

west, both walls porphyry, an inch to an inch and one-half thick, sample assaying a trace of silver, 0.09 ounces gold.

F. Designated as vein No. 4, forty-five feet from the shaft, running north 10 degrees east, dipping 48 degrees west, both walls porphyry, one to three inches thick, samples assaying no silver, 0.13 ounces gold, and 0.4 ounces silver and 0.11 ounces gold.

All of these veins were disputed by the testimony of four witnesses of plaintiffs in error, including Charles Slavin, the lessee of the locators (R., fol. 284, p. 175), who drove the drift.

The blue-print photograph (R., fol. 222, p. 134) is a copy of the map presented by the leading expert witness for defendant in error, showing the positions of these veins as claimed.

In their cross-complaint defendant in error made no claim of title through the Pocket Liner shaft or a discovery therein, their sole allegation of title being as follows:

"That afterwards and prior to the twenty-fifth day of January, A. D. 1894, they sank a discovery shaft on said premises to a depth of more than ten (10) feet from the lowest part of the rim of said shaft at the surface and discovered therein a vein, lode, ledge or deposit of mineral in rock in place bearing silver and other metals" (R., fol. 20, p. 11).

Every offer of evidence on the part of defendant in error was granted and allowed, and the conclusion was, of course, a verdict for them.

The following is a specification of the errors relied upon (see R., fols. 404–421, pp. 245–256):

"ASSIGNMENT OF ERRORS.

"And now come the above named plaintiffs in error and for assignments of errors herein, say: That in the record and proceedings in said cause the supreme court of Colorado, and the district court of the fifth judicial district in and for the county of Lake and State of Colorado, committed manifest error to the injury of these plaintiffs in error in the following particulars in this, to-wit:

"First. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado; that the plaintiffs in error were not entitled under section 2320 of the Revised Statutes of the United States to prove the discovery of and existence of a lode and vein of gold and silver ore within the limits of their Eulalia Lode mining location, antecedent to and prior to their location of said ground, upon the 30th day of May, A. D. 1893, and the recording of their location certificate upon June 17th, 1893, whether made and discovered by themselves or other parties; and that they knew and claimed at the time of making their location, that there had been a discovery of a vein or lode within the limits of their location, and that the construction put upon that part of section 2320, of the Revised Statutes of the United States, which says:

> "'No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located'

by the supreme court of Colorado, was adverse to and in opposition to the rights of plaintiffs in error under the said statute of the United States, and in direct contravention of plaintiffs in erorr's express right, title, privilege and immunity, to prove the existence and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location;

"That such construction of the evidence offered by the plaintiffs in error in the trial court, and the sustaining of the said ruling by the supreme court of Colorado, was in direct opposition to and not in accordance with the following decisions of the United States courts and the appellate courts of the other mining States, upon the same offer of evidence:

"Book *v.* Justice Mining Co., 58 Fed. Rep., 106.
"Jupiter M. Co. *v.* Bodie Cons. M. Co., 11 Fed., 666.
"Nevada Sierra Oil Co. *v.* The Home Oil Co., 98 Fed. Rep., 673.
"Erwin *v.* Perego, 93 Fed. Rep., 611.
"Conway *v.* Hart, 129 Cal., 480; 62 Pac., 44.
"Hayes *v.* Lavagnino, 17 Utah, 185; 53 Pac. Rep., 1020.
"Werner *v.* McNulty, 7 Mont., 30; 14 Pac. Rep., 643.
"O'Donnell *v.* Glenn, 8 Mont., 284; 19 Pac. Rep., 302.

"Second. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing *Thomas H. Thompson*, witness for plaintiffs in error, and the former partner of Samuel McMillen, in the Pocket Liner Lode location, to answer the following question:

"'Q. Will you state what you found in that shaft in the year 1879?'

"That such ruling was adverse to and in contravention of plaintiffs in error's express rights, title, privilege, and immunity under section 2320 of the Revised Statutes of the United States, to prove the existence and discovery of a vein and lode of precious ores at any point and place within the surveyed and claimed limits of their location, and was at variance with the uniform rule and practice of the United States courts, and of the supreme courts of the mining States, in admitting evidence of this character.

"Third. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing Steven Connors, witness for plaintiffs in error, and former owner in the Pocket Liner Lode location, to answer the following question:

"'Q. Will you state, if you remember what were the contents, not the number of ounces—will you state whether that assay showed the presence of gold and silver within that rock that you gave to the assayer?'

"That such ruling was adverse to and in contravention of plaintiffs in error's express rights, title, privilege and immunity, under sec. 2320 of the Revised Statutes of the United States, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

"Fourth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing George Holland, witness for plaintiffs in error, and a United States deputy mineral surveyor at the date of the survey of the Eulalia Lode mining claim, May 30th, 1893, to answer the following question:

"'Q. When you were at the Pocket Liner shaft was there anything said by one of the parties present, especially Mr. McMillen, one of your employers, as to the presence of mineral in that shaft?'

"That said ruling was adverse to and in contravention of

plaintiffs in error's express right, title, privilege and immunity, under sec. 2320 of the Revised Statutes of the United States to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

"Fifth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, as stated in folios 357, 358 and 359 abstract as follows:

"'Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen as an owner and a locator of the Eulalia lode knew, at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with the co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground, claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States, and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc. etc. etc.

"'The COURT: I cannot agree with you. Our statute is clear as to what is required and it has become almost elementary. You must go either upon the vein and make your discovery, or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained.'

"That the prohibition of the trial court, excluding all testimony of the existence of a vein and lode at any other point within the limits of their Eulalia location at the date of location unless shown in their surveyed discovery shaft, and the court's construction of the statute of Colorado, act of February 13th, 1874, General Laws of Colorado 1883, section 2401, was in direct conflict with the requirements of section 2320 of the United States Statutes. That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of, and against

the title, right, privilege and immunity claimed by plaintiffs in error under section 2320, United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

"Sixth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, in refusing to give instruction No. two asked by plaintiffs in error, as follows:

"'The court further instructs the jury that although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued this would make his location a valid and legal one.'

"Seventh. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. four asked by plaintiffs in error, as follows:

"'The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz, or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator before the location was made of the existence of mineral.

"'And under section 2320 Revised Statutes of the United States, the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location, there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location even though the discovery was first made by some one other than the locator.'

"Eighth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. five asked by plaintiffs in error, as follows:

"'The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first

discoverer of a vein or lode, in order to make a valid location.

"'It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, but it must be known to him and claimed by him in order to give validity to the location.'

"Ninth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. 8 asked by plaintiffs in error as follows:

"The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January, A. D. 1894, the plaintiffs or their grantors, were in the quiet and undisputed possession of the premises designated in the complaint as the 'Eulalia lode,' claimed by the defendant as the 'Golden Rod lode;' that upon May 30th, 1893, long prior to said 25th day of January, A. D. 1894, plaintiffs or their grantors posted on the surface a plain sign or notice containing the name, 'the Eulalia lode,' the name John Kennedy, the locator, and the 30th day of May, 1893, the date of location; that the plaintiffs or their grantors so marked the boundaries of said Eulalia Lode mining claim by the erection of six substantial stakes hewed or marked on the sides in toward the claim and sunk in the ground, one at each corner and one at the center of each side line so as to be readily traced, and that on or about June 17, 1893, and within ninety days of said 30th day of May, A. D. 1893, the said plaintiffs duly recorded a location certificate containing the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface; *and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock, in place, bearing gold, silver, or other precious metals, then this constitutes a prima facie* case for the plaintiffs which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture and the acquisition of a better right or title by the defendant and its grantors."

"Tenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado; that the plaintiffs in error were not entitled under section 2320 of the Revised Statutes of the United States, to prove that in September, October, November and December, 1894, appellants drove a drift from the workings of the Little Vinnie Lode mining claim at a point 380 feet from the surface of the earth, into the southeast fraction of their Eulalia claim, a distance of over 64 feet, and also constructed and opened certain upraises and stopes within the limits and boundaries of their Eulalia Lode claim as surveyed; and that in these workings and developments, within the limits of their Eulalia location, they discovered, disclosed and opened a large and valuable vein of gold and silver bearing ore in rock in place, and from this vein shipped large quantities of gold and silver bearing ore to the smelters.

"That such ruling and construction of the statutes of Colorado, upon the objection of the defendants, was in direct conflict with the requirements and provisions of section 2320 of the United States Statutes. That under such construction and ruling, the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error under section 2320 United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation of the rights of plaintiffs in error, not only under section 2320 of the United States Statutes, but also in contravention of their vested rights under section 7, page 127, of the General Laws of 1874, of the Territory of Colorado, which is section 2403, page 723, General Statutes of Colorado 1883, which reads as follows:

"'Any open cut, cross-cut or tunnel which shall cut a lode at a depth of 10 feet below the surface, shall hold the same as if a discovery shaft were sunk thereon, or an adit of at least 10 feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.'

and that such ruling was adverse to the construction of section 2403, Laws of 1883, given and rendered by the supreme court of Colorado in

Hall *v.* Kearney, 18 Colo., 505;
Brewster *v.* Shoemaker, 28 Colo., 176.

"Eleventh. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the map and testimony of W. L. G. Smith, of the drift, stopes, and upraises, and the vein of gold and silver ore found therein, opened and constructed by plaintiffs in error from the 380-foot level of the Little Vinnie lode into their Eulalia lode—see folios 321–331 of abstract, as follows:

"'W. L. G. Smith, mining engineer, in October, November and December 1894, and January 1895. I was employed by Ronald Morrison about that time to survey along the lines of the Little Vinnie lode, what is known as the Eulalia lode, I have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode.

"'Q. Have you such a map?

"'A. Yes.

"'Q. Is this the map, sir?

"'Mr. CAVENDER: I object to that. It appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"'Mr. ELDER: Second. We offer that in case of the working of the Eulalia lode and shipping of ore, or the discovery of mineral in either the drift or the stopes above the drift during the period of the year 1894, that would be a sufficient discovery of mineral, in the failure of a discovery by other parties prior to that period of time and that such a discovery would inure to and relate back to the original location of this claim upon the ground.

"'The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery, you must in some way show that it was accessible from the ground claimed by you, and on which it was intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground, which would have made or constituted visible notice to somebody intending to locate, that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

"'Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"'The COURT: I hold most emphatically this, that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.

"'Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"'The COURT: There was nothing as far as I see the evidence now; I may be mistaken. This particular part which you point out, which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist 300 or 400 feet underground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery, to constitute a discovery.

"'Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States Statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property?

"'The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift, for the purpose of establishing a discovery on the Eulalia ground, unless you show an opening or visible connection with the surface of the Eulalia ground, which would have constitnted notice to any one intending to locate the same.

"'Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the

purpose of showing a discovery from the underground workings of the Little Vinnie claim?

"'The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"'To which ruling of the court, plaintiffs by their counsel then and there duly excepted.'

"'That such ruling and construction of the statute of Colorado, upon the objection of defendants, was in direct conflict with the requirements and provisions of section 2320 of the United States Statutes.

"That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874 is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error, under section 2320 United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation of the rights of plaintiffs in error, not only under section 2320 of the United States Statutes but also in contravention of their vested rights under section 7, page 127 of the General Laws of 1874 of the Territory of Colorado, which is section 2403, page 733, General Statutes of Colorado 1883, which reads as follows:

"'Any open cut, cross-cut, or tunnel which shall cut a lode at the depth of 10 feet below the surface, shall hold such lode the same as if a discovery shaft were sunk thereon, or an adit of at least 10 feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.'

"And that such ruling was adverse to the construction of section 2403, Laws of 1883, given and rendered by the supreme court of Colorado in:

"Hall *v.* Kearney, 18 Colo. 505;

"Brewster *v.* Shoemaker, 28 Colo., 176.

"Twelfth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the testimony of M. N. McInnis, miner, of the drift, stopes, and upraises made and constructed by plaintiffs in error, and the vein of gold and silver ore found

therein, discovered and disclosed by appellants from the 380-foot level of the Little Vinnie lode into their Eulalia lode,—see folios 335, 336, 337, of abstract, as follows:

"'M. N. McInnis, miner: Have mined upon Breece hill,—mined on the Little Vinnie in December, 1894,—am familiar with the underground workings of the Little Vinnie, yes sir, part of it; am familiar with what is known as the 380-foot level of the Little Vinnie.

"'Q. Do you know of any work having been done from that level towards the Eulalia Lode claim in the fall?

"'A. We have an upraaise; we have a stope there in that level.

"'Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

"'Objected to by defendant.

"'The COURT: What is the purpose of it?

"'Mr. ELDER: We are going to prove we shipped ore from that ground.

"'The COURT: They will perhaps admit that you did.

"'Mr. EWING: No, we will not admit that; but this comes under the same objection. And the court sustained such objection. The court has already decided that such a drift does not constitute a discovery.

"'To which ruling of the court plaintiffs, by their counsel, duly excepted.'

"That such ruling and construction of the statutes of Colorado, upon the objection of defendants, was in direct conflict with the requirements and provisions of section 2320 of the United States Statutes.

"That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error, under section 2320, United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation and contravention of their vested rights under section 7, page 127, of the General Laws of 1874

of the Territory of Colorado, which is section 2403, page 733, General Statutes of Colorado, 1883.

"Thirteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the testimony of W. L. G. Smith and M. N. McInnis, as stated in assignment of error No. 5, as follows (see folio 727):

"'5. The court erred in holding that the United States statutes and the statutes of Colorado required plaintiffs to show an opening or openings within the lines of their Eulalia claim from any vein, lode or ledge discovered by them within the limits of their Eulalia claim to the surface of the earth, before the plaintiffs could claim and prove a discovery of such vein, lode or ledge from, by or through workings having their only openings on territory outside the limits of their Eulalia claim.'

"That such ruling and decision of the supreme court of Colorado is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error under section 2320 United States Statutes, to prove the existence, and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

"Fourteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. nine asked by plaintiffs in error, as follows:

"'The court instructs the jury that if they believe from the evidence that no lode, ledge or vein of quartz or other rock in place, bearing gold, silver or other precious metals had been disclosed and discovered in the discovery shaft of the Eulalia lode, or in the shaft known as the Pocket Liner shaft, prior to the location of the Eulalia lode upon the 30th day of May, 1893, either by the plaintiffs herein, their grantors, or some of them, or by third parties, with the knowledge of such discovery by plaintiffs herein, their grantors, or some of them, and if they believe further from the evidence that no lode, ledge, or vein of quartz or other rock in place, bearing gold, silver, or other precious metals, had been disclosed and discovered in the Golden Rod discovery shaft, or in the shaft known as the Pocket Liner shaft by the defendants or its grantors. And if the jury believe from the evidence that the plaintiffs herein, their

grantors or some of them, discovered a vein, lode or ledge of quartz or other rock, in place, bearing gold, silver or other precious metals, at a depth greater than ten feet below the surface of the earth in the part or portion of said premises as designated by them as the southeast Eulalia fraction, prior to any other discovery by defendant or its grantors, you are instructed that such discovery by plaintiffs relates back to the time of the original survey and location of the said Eulalia lode, and enables the plaintiffs and their grantors to hold the claim against all who had not acquired interests in the lode and premises at the time the acts were performed, and your verdict will then be for the plaintiffs.'

"Fifteenth. That the supreme court of Colorado erred in refusing to consider and pass upon assignments of error Nos. 2, 3, 4, 8, 10, 11, 12, and 13 of plaintiffs in error.

"Sixteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in excluding every offer of evidence made by plaintiffs in error, in support of their title and in refusing to give every instruction asked by plaintiffs in error; and in admitting every offer of evidence made by defendants in error in support of their title, and in giving each and every instruction to the jury asked by defendants in error.

"Seventeenth. That the supreme court of Colorado erred in assuming that plaintiffs in error did not upon May 30th, 1893, claim all the veins and lodes in the ground included within the boundaries and limits of their Eulalia Lode mining claim, and claimed each and every vein in those limits, whether the one some of their number opened and discovered in 1879 and 1880 in the Pocket Liner shaft, the ore and crevice material shown on the dump of the Winter discovery shaft, less than forty feet from their Eulalia discovery shaft, or the vein and deposit from which tons upon tons of pay ore were shipped from their opening into the southeast Eulalia fraction from the 380-foot level of the Little Vinnie lode from between the porphyry and quartz contact found at that point, and the admitted fact of their prior location of eight months and their prior record of their location certificate, and their prior possession and occupation of the ground, forever disproves this assumption of the court.

"That the refusal of the court to allow this evidence to go to the jury was in contravention of the title, right, privi-

lege and immunity claimed by plaintiffs in error under section 2320 United States Statutes.

"Eighteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in establishing the mineral land title in the junior locator of two mining locations where, as appears by the evidence, both discovery shafts were sunk in the wash and were but four feet apart, and neither of them were sunk over a depth of twelve feet, and in permitting the junior locator to introduce evidence of a vein or lode in some other part and portion of the ground, and in refusing such privilege to the senior locator.

"Nineteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in allowing defendants in error to prove the presence or discovery of a vein or lode at another point in their location than the one at which they posted their discovery notice, and where they claimed their original discovery shaft, and in refusing the same privilege and opportunity to plaintiffs in error.

"Twentieth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in permitting evidence of the third amended location certificate, dated March 8th, 1895, of defendants in error, changing their discovery shaft from a point three hundred and seventy-five (375) feet from their east end line to a point over one thousand (1,000) feet west of their first discovery, and no proof being submitted of their placing of a new discovery notice at this new discovery shaft, the same being filed long after the discovery, opening up and shipping by plaintiffs in error of pay ore from their opening along the side line of the Little Vinnie lode at its 380-foot level, and while defendants in error were still claiming by their second amended location certificate, filed Dec. 12th, 1894, their original discovery shaft as their point of discovery. There is no provision of the statutes of the United States or of the statutes of Colorado by which an invalid discovery of mineral can be cured by the record of an amended or additional location certificate.

"Twenty-first. The supreme court of Colorado erred in confusing the facts of this case in its second opinion, upon the denial of plaintiffs in error's motion for rehearing, in

assuming that defendants in error made any claim whatever as the basis of their title to the only vein in the Pocket Liner shaft, discovered by Samuel McMillen and his associates in that shaft in 1879 and 1880, at the depth of from 90 to 114 feet, but their evidence and claim of title was based only and solely upon what they claimed to be six separate and distinct veins in their east drift, forty-five feet long, at a depth of 135 feet in the same shaft, and which their own witness and lessee, Thomas Slavin, testified were not veins at all, and only cracks and selvedges in the porphyry.

"Twenty-two. The supreme court of Colorado erred in sustaining the judgment of the district court of Lake county, while admitting errors of law in the admission and exclusion of evidence in both of their opinions, because the same were against the law and the facts.

"Twenty-three. That the supreme court of Colorado erred in sustaining the instruction No. six, given to the jury as asked by defendants in error against the exceptions of the plaintiffs in error, as follows:

"'The court further instructs the jury that under the pleadings and evidence in this cause, the plaintiffs cannot recover, and the sole issue presented to the jury is as to whether the defendant or its grantors have made a valid discovery and location upon the Golden Rod claim and performed the necessary work thereon.'

"Twenty-four. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to send the jury to the ground to inspect the premises as requested by plaintiffs in error.

"Twenty-fifth. That the supreme court of Colorado erred in not reversing the judgment herein, instead of affirming the same.

"Wherefore, the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment of said supreme court of the State of Colorado.

"GEORGE R. ELDER,
"*Attorney for Plaintiffs in Error.*"

Section 2320, Revised Statutes of the United States, reads as follows:

"Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons may equal, but shall not exceed one thousand five hundred feet in length along the vein or lode; *but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.*" (Sec. 2, Acts of Congress, May 10, 1872.)

The following are the two sections of the mining-location statutes of Colorado whose construction by the supreme court of Colorado was adverse to and in opposition to the rights of plaintiffs in error under section 2320 of the Revised Statutes of the United States and in direct contravention of plaintiffs in error's express right, title, privilege, and immunity to prove the existence and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location.

Mills' Annotated Statutes, section 3152:

"Before filing such location certificate the discoverer shall locate his claim by:

"First. Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice.

"Second. By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

"Third. By marking the surface boundaries of the claim" (Feb. 13, 1874).

Mills' Annotated Statutes, section 3154:

"Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such

lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft" (Feb. 13, 1874).

ARGUMENT.

First. Plaintiffs in error were entitled under section 2320 of the Revised Statutes of the United States to introduce evidence that at and prior to the location of their Eulalia lode, upon May 30, 1893, there had been a discovery theretofore made of a vein or lode of quartz or other rock in place bearing gold and silver, whether made by themselves, some of them, or other parties, and that they knew and claimed at the time of making their location that there had been a discovery of a vein or lode within the limits of their location, and that in making this proof they were not confined to the discovery shaft so called in their location certificate, but were entitled under said section 2320 to prove the existence and discovery of such vein and lode at any point within the surveyed limits of their location, and that the ruling of the trial court and the supreme court of Colorado sustaining such ruling that section 3152, Mills' Annotated Statutes of Colorado, absolutely inhibited plaintiffs in error from making such proof and put a construction upon that part of section 2320 of the Revised Statutes of the United States which says:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

which was adverse to and in opposition to the rights of plaintiffs in error under said statute and in direct contravention of plaintiffs in error's express right, title, privilege, and immunity under said statute to prove the existence of a vein and lode and their knowledge of a prior discovery

thereof at any point and place within the surveyed and claimed limits of their location, and that such construction, in so far as it was based upon section 3152, Mills' Annotated Statutes of Colorado, rendered the same nugatory, invalid, and objectionable to section 2320 of the United States Revised Statutes.

The foregoing general statement contains the substance of the first nine assignments of error (R., fols. 404–410, pp. 245–249).

Plaintiffs in error entered upon the ground in dispute May 30, 1893. The attempted entry of the grantors of defendant in error was made January 25, 1894.

The cardinal principle which governs the conflicting claims of appropriators of mining claims and other rights on the public domain is that, other things being equal, the prior locator prevails, "*qui prior est tempore potior est jure.*" Therefore, as the location of the plaintiffs in error was prior to that of the defendant, it must prevail, unless the location itself was fatally defective or all rights under it were lost on account of subsequent occurrences.

One of the most comprehensive decisions ever rendered upon mining law is the first leading decision we will cite upon the question of how far the previous discovery of a vein, and the knowledge of the locator of the existence of a lode and vein within the limits of his location previously discovered or disclosed by himself or by some one else and abandoned and unoccupied at the time of his location, constitutes a valid location and compliance with the mining statutes of the United States in the case of

Book *et al. vs.* Justice Mining Company, 58 Fed., 106.

This suit was an action in equity brought by the owners of the "Peerless" mining location, made by them September 22, 1892, to quiet their title against the Justice Mining Company, which claimed title to the ground under and by virtue of the mining locations known as the "West Justice" and "James G. Blaine" lodes, located the 2d day of January,

1888. These locations were upon Gold Hill, Storey county, Nevada, and the ground within the limits of the claims had been located and claimed over and over again by miners and prospectors, being known as valuable mining ground for twenty years prior to the location by the Justice Company, and being upon and in close proximity to the great Comstock ledge.

Section twenty (20) of the syllabus of the opinion prepared by the court is as follows (page 109):

"It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location. It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location."

On page 128 the court states:

"It is an undisputed fact that the locators of the West Justice and Blaine locations were not the original discoverers of the vein or lode, but it is not necessary that the locators should be the first discoverers of a lode in order to make a valid location. It is sufficient if it is shown that the locators knew at the time of making their locations that there had been a discovery of a vein or lode within the limits of the locations made by them."

Citing Jupiter M. Co. *v.* Bodie Cons. M. Co., 11 Fed. Rep., 666.

We desire to call the court's attention to the close analogy of the facts of the location of the Eulalia lode with those of the facts of the West Justice and James G. Blaine locations, and for that purpose we quote the review of the testimony by Judge Hawley upon pages 121 and 122:

"Upon the part of the defendant, Lyons testified that the northwestern part of the West Justice ground had been worked by miners in 1878 and 1879; that he knew that gold and silver bearing rock and earth had been taken out of the cuts that had been made by the miners who at that time were working upon and claimed the same as mining

ground; that prior to making the West Justice location he knew that there was a lode within the boundaries of that location containing gold and silver bearing rock and ore. He described the places where the old workings were, and the open cuts which still exist upon the surface of the ground. He further testified that in 1882, when he was foreman of the Justice mine, he let a contract to four men, and that they took out from the open cuts about $800 in gold and silver ore. Other witnesses corroborate his testimony. Harrington testified that before making the Blaine location he was all over the ground and examined it closely; that he discovered and found quartz rock in place bearing mineral within the limits of the Blaine location; that he found holes that had been sunk seven or eight feet long and six feet deep, and three or four feet in width in the ground, in which was quartz rock in place; that there were several holes sunk down below the surface in solid rock, in which streaks of quartz and porphyry were found; and that he saw in some of these holes streaks of quartz a foot wide. Other witnesses corroborated this testimony."

The latitude allowed by Judge Hawley in permitting evidence of what occurred upon the ground in 1878 and 1879, over ten years before the location of the West Justice and James G. Blaine lodes, and again in permitting testimony as to the open cuts and trenches and the $800 in gold and silver taken from them in 1882, over six years prior to the location of the West Justice and James G. Blaine locations, all these acts and all of this work being performed by strangers to the later title, is in striking contrast to the narrow and inconsiderate ruling of the trial court in this case in refusing and excluding evidence and testimony going to show that Samuel McMillen, one of the plaintiffs in error, had, in 1879 and 1880, while working with his copartners in the Pocket Liner lode, sinking that shaft, opened, discovered, and disclosed a vein of mineral bearing gold and silver some eighty or ninety feet from the surface, and sunk his shaft therein to a depth of twenty-five or thirty feet further. This ruling of the trial court as against plaintiffs' rights was all

the more unreasonable in that he allowed Charles Slavin, one of the witnesses of the defendant, to testify as to that vein in his direct examination (R., fol. 282, p. 174), although the defendants below nowhere and at no time in this case base their title upon this vein.

Judge Hawley, in applying this principle to the Book state of facts, only followed in the footsteps of a greater and more distinguished judge, his predecessor in the same district of Nevada upon the United States bench, judge Sawyer, who announced the same doctrine in the case of Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed. Rep., 666, saying, p. 676:

"It is not necessary that the locator should be the first discoverer of the vein, but it must be known and claimed by him in order to give validity to his location."

Again, Judge Ross, of the United States circuit bench, in the case of Nevada Sierra Oil Co. *vs.* Home Oil Co., 98 Fed., 673, states, page 679, the identical principle we contend for:

"It is also true, as a matter of law, that it is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location."

On page 676 of the same opinion he expresses the true view of the liberality courts should extend to locators of mining claims:

"It is entirely true that the statute, requiring as a condition to a valid location the discovery of mineral within the limits of the claim, should as between conflicting claimants to mineral lands, *receive a broad and liberal construction*, and so as to protect *bona fide* locators who have really made a discovery of mineral, whether it be under the statute providing for the location of vein or lode claims or placer claims."

We claim for plaintiffs in error that the discovery made by one of them, Samuel McMillen, in the Pocket Liner shaft, while the same was being sunk in the years 1879 and 1880, formed a complete compliance and performance of one of the two prerequisites prescribed by the acts of Congress to vest in him the complete possessory title to his Eulalia Lode mining claim, and that his entry upon the 30th of May, 1893, and distinctly marking the said claim by staking monuments and surveying the lines on the ground and recording June 17, 1893, a location certificate accurately describing said claim by metes and bounds and permanent monuments, and sinking a discovery shaft over a depth of ten feet, completed the other prerequisite to vest the title in himself and his colocators.

In the case of Erwin *vs.* Perego, 93 Fed., 611, Justice Sanborn, of the circuit court of appeals, most clearly states what are these preliminary and necessary incidents to the acquiring mining titles to lode claims:

"The acts of Congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-bearing lode, and the distinct marking of the boundaries of his claim so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but when these requirements have been complied with the land is no longer public, but the possession and the right to the possession and the right to acquire the title are irrevocably vested in the locator."

Citing—

U. S. Rev. Sts., 2319, 2320, 2324.
1 Lindley Mines, 273, 328, 350.
Book *vs.* Min. Co., 58 Fed., 108.
Jup. M. Co. *vs.* Bodie Cons. M. Co., 11 Fed., 666.
Zollars *vs.* Evans, 5 Fed., 172.
McGinnis *vs.* Egbert, 8 Colo., 41.

Further, same page 611:

"There is no reason to be deduced from the acts of Congress or from the nature of the case why a claim upon which the location was made before the discovery should be held void, while one upon which the discovery was made before the location should be held valid, and the rights of these locators should be left where the Congress established them, valid and vested when both acts have been done, regardless of their order, but void and ineffectual when the rights of others have intervened before either act has been completed. The order in which the statutory requirements for securing a lode mining claim are complied with is immaterial, so long as the rights of others do not intervene before they are complied with. The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will enure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of a later date."

And on page 612 the court says:

"It is not necessary that a locator shall make the first discovery of a vein or lode within his claim, all that the statutes require is that he shall discover the lode within his claim."

In the Perego case it seems, like Mr. McMillen, he made a discovery of a lode inside the limits of another claim upon September 5, 1888, and Perego lost title to his point of discovery by the patenting of the "Gopher" claim, a prior location. So did Mr. McMillen and his successors, owners of the Pocket Liner lode, by the approved survey of the Winter lode, U. S. survey 427, and their failure to adverse, lose the title gained by the discovery of the lode and vein found eighty feet down the Pocket Liner shaft in 1879 and 1880. Perego went outside of the Gopher claim lines, and in 1889 located his Star lode again. When the Eulalia lode was located by John Kennedy for the use of the plaintiffs in error in this case on May 30, 1893, both the Winter lode and the

Pocket Liner lode had been forfeited for failure to do and perform the annual labor for over twelve or thirteen years, and, as a matter of fact, the Land Department only cancelled the application for patent of the Winter lode after the protest and hearing had of John Kennedy, owner of the Eulalia lode, *vs.* W. E. Johnston *et al.*, owners of the Winter lode, by letter of the honorable Commissioner of the General Land Office, dated February 24, 1896 (Clark's Mineral Law Digest, Kennedy *vs.* Johnston, pp. 96, 135, 216, 227, 245, and 309).

In all these cases the courts without hesitation permitted contestants to enter into the history of the ground and into actual discoveries and appearances of discoveries on the ground, and the knowledge of the first claimants as to the occurrence and presence of mineral in place prior to their entries, and into the different locations made upon the ground, and in all the cases in the books we fail to find a single one that prohibits a locator from adopting and claiming a vein or lode as his discovery, whether the same was opened and disclosed by himself or others, only insisting that it was then unclaimed and unappropriated, and that the new locator knew of its discovery and thereafter adopted the discovery by proper survey and record.

Taking these decisions of Judges Sawyer, Hawley, Ross, and Sanborn, as the definite statement of this principle of the mining law, we are safe in claiming that the United States decisions are a unit upon this proposition. Up to the filing of this Eulalia case in the Supreme Court of the United States we are not aware that the Supreme Court of the United States has ever passed upon this question or has ever reversed, qualified, or limited these decisions of the Federal courts, as contained in

Book *vs.* Mining Co., 58 Fed., 108.
Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed., 666.
Nevada Sierra Oil Co. *vs.* Home Oil Co., 98 Fed., 673.
Erwin *vs.* Perego, 93 Fed., 611.

But the United States bench is not alone in announcing and upholding this theory and principle of the law.

CALIFORNIA.

Conway *vs.* Hart, 129 Cal., 480, section 2, syllabus is:

"Evidence that, prior to the location of the claim in question, plaintiffs had sunk a shaft 25 or 30 feet and had taken from it a considerable amount of quartz rock, which formed a dump, and that rich rock was found, and that in surveying the claim the surveyor measured along the lode line taking his directions for the course of the vein from a line drawn from the shaft through two or three prospect holes where the ledge was exposed, together with the admission of the contesting claimant that the rock taken out was gold-bearing is sufficient to show that a gold-bearing lode or vein had been discovered by plaintiffs within their claim at the time the location was made."

Opinion, page 45, Judge McFarland states the facts more at large:

"2. We think that there was sufficient evidence to warrant the court in finding that the plaintiffs had discovered a lode before their location in 1894, although the plaintiffs, who seemed to have taken this fact for granted, could evidently have put the matter beyond a doubt by simply asking any one of their witnesses a direct question upon that subject. They, as before stated, had located this claim several years prior to 1894 and had done a good deal of work on it. They had sunk a shaft twenty-five or thirty feet deep, and had taken from it a considerable amount of quartz rock, which formed a dump. The witness Heiser, who had worked for plaintiff, testified that some years before the last location he found rich rock on the south end of the claim and informed one of the respondents of this fact, and warned him that the claim was jumpable, and that he afterwards got rock both from the shaft and the dump to show an expert. The witness Morse, when testifying about measuring the claim said: 'I measured along the lode line about the middle of May. I measured from the center of the shaft in Bear creek 1,200 along the

course of the vein so far as I could judge its course. As the ground is all capped, there is no rock in place at the surface. I took my directions for the course of the vein from a line drawn from the shaft through two or three prospect holes on the northern end of the claim, where the ledge is exposed.'"

And although this was after the location of 1894, still it has a bearing on the question, for the testimony is fairly susceptible of the meaning that the vein was exposed in the shaft which plaintiffs had sunk several years before their second location. The plaintiff Conway testified—indirectly, to be sure—to his knowledge of the vein at the time of the location, as appears from the following question and answer:

"Q. What direction does the vein run upon which you posted this notice? A. North and south."

The defendant himself, when on the witness stand, testified as follows:

"Some work had been done south of the shaft in Bear creek in the direction of my tunnel, that I know of in 1885 and 1886. It was done almost on my line in the direction of my shaft from the tunnel—between—on the vein. I was there when the work was in progress in 1886. At that time Mr. Conway and Mr. Heiser were working there. That work was inside the boundaries of my claim, probably 300 feet south of my north line. The rock was gold bearing."

"Now, there is no doubt whatever that there actually is, and of course at the date of the location was, a gold-bearing lode there. The appellant so avers in his answer, and proves by his testimony, and, considering all the evidence, we cannot say that the court was not warranted in holding that the rock taken by respondents and placed on the dump was not mere float rock, but rock taken from the lode which all admit to be there, *and that, consequently, respondents knew of the existence of the lode when their location in 1894 was made.* The evidence on the point was, of course, not very direct and explicit but it was sufficient to sustain the finding."

While the facts of this California case are clearly similar and almost identical with the facts of the Eulalia location, the evidence was mainly inferential, whereas in the Eulalia case the vein is testified to by several witnesses.

There are three points of resemblance in these cases:

First. Is the former location of the same ground by the same parties or some of them?

Second. That in each case the work of discovery—that is, sinking a shaft to the lode or vein—was done years before the location in the California case to a depth of twenty-five or thirty feet and in the Eulalia case at bar to a depth of 125 or 130 feet.

The third point of resemblance is that the undisputed fact is present in both cases of the existence of a gold and silver lode and vein in each claim at the date of location and knowledge of the existence of the lode in the minds of the locators, for in each case they were owners in the first location and were personally present when the lodes and veins were opened and discovered.

Just as in the case of Book *vs.* Justice Co., in 58th Federal, the California trial judge permitted evidence to go to the jury of work upon the ground and the discovery of vein material in the years 1885 and 1886, and also several years prior to the location in 1894, without introducing error into the case or considering, as does Judge Owers, the trial judge in the case at bar, that it was immaterial what Samuel McMillen or his partner, Thomas H. Thompson, found in their 125-foot shaft when they owned the ground as the Pocket Liner lode claim, and that the proof of a vein in the claim found by Samuel McMillen, Thompson, and his partners prior to the 30th of May, 1893, did not tend to establish any issue in the case, and that it was clearly inadmissible under the Colorado mining statute (R., fols. 169–170, pp. 101, 102).

And the supreme court of California had no difficulty in

sustaining the prior locator's title, and once again sustaining the cardinal principle which governs the conflicting claims of appropriators of mining claims and other rights on the public domain that, other things being equal, the prior locator prevails. "*Qui prior est tempore potior est jure.*"

UTAH.

The supreme court of Utah, in Hayes *vs.* Lavagnino, 17 Utah, 185; 53 Pac. Rep., 1029, stated the rule in even more unequivocal terms, as stated in paragraphs 2 and 3 of the syllabus:

"2. In a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place bearing mineral, with the discovery, or knowledge on the part of the locator, before the location was made, of the existence of mineral there.

"3. Under section 2320 Rev. St. U. S. the locator of a mining claim is not required to be the original discoverer of the vein or lode. If at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator."

Again, the evidence is wonderfully like the evidence excluded by the court below in the case at bar, and it is significant that the appellate court reversed the case exactly for the reasons that should reverse this case, extending the rule to a discovery of mineral made by others prior to the location and by strangers to the record.

We quote from evidence, p. 1031, Pac., 53:

"It appears the ground constituting the Gladstone claim was first located in 1878 and work done in sinking the discovery shaft. Thereafter it was several times relocated under different names, until in January 1882 when it was

located as the Gladstone claim. The parcel of ground thus located extends in a northeasterly and southwesterly direction, being bounded on the northeast by the Revere claim and on the southwest by the Montreal.

"This fraction of ground now called the 'Gladstone,' was first located in 1878. The shaft now used by the appellants for a discovery shaft was then used as a discovery shaft by the then locators."

"It is thus conceded that the discovery shaft was sunk before 1882, and, therefore, whatever mineral strata or vein may be shown to exist there must have been discovered before the location of the Gladstone, and it is but just and reasonable, under the circumstances of this case, to infer that, if a mineralized vein or lode was discovered by the sinking of that shaft, its existence was known to the locators of the Gladstone before the location was made. If a vein or lode actually exists at the point of their discovery, then such discovery would seem to be a substantial compliance with the provisions of section 2320, Revised Statutes of the United States, which reads:"

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

"This clause of the statute does not require that the locator of the claim must be the original discoverer of the vein or lode. If, then, in this case there was a discovery of a vein, *and knowledge on the part of the locators of metal there*, the locators were entitled to make their location, even though the original discovery was made by some one other than the locators (Jupiter Min. Co. *vs.* Bodie Cons. M. Co., 11 Fed., 666; Erhardt *vs.* Boaro, 113 U. S., 527). Does, then, the evidence show the existence of a vein or lode within the meaning of the statute? On this point the witness Gibbons, who has known that ground since 1880, testified:

"'I know what was shown me as the discovery of the Gladstone. I examined with a view of determining whether or not there is a cropping of the vein there. There are indications of a vein there. There is a shaft down there and some water in the bottom of it. The surface indications on the other side of the shaft are mineralized.

"'Q. Were they such indications that a miner would follow in that district, expecting to find a vein? A. Yes sir.

"'Q. Did you ever see any ore taken from there or any rock taken from the surface? A. Yes, sir.

"'Q. Is that the character of the rock, or the outcropping on the surface where this discovery was shown to be made? A. Yes, sir.

"'Q. Would that indicate a mineral vein in that locality? A. Yes sir, it would to me.'"

MONTANA.

Again, in Werner *vs.* McNulty, reported in 14 Pac., 643, the supreme court sustained an instruction covering this identical proposition of law. The instruction was as follows:

"It is not necessary that the work by which the vein or lead was discovered and made visible should be made by the locators. *It is sufficient if, at the time of location, the vein or lead is exposed to view, and its existence known by the locator for these facts would be equivalent to a discovery.*

Both the lower court and the supreme court in the above case found no difficulty in sustaining the same rule of law, "*Qui prior est tempore potior est jure.*"

The references we have made are surely sufficient to sustain the proposition that knowledge of the existence of a vein within the limits of his location, prior to such location, is a sufficient discovery and disclosure of a vein or lode under the statutes of the United States and the State of Colorado.

It is a remarkable coincidence that long prior to these decisions we have cited Judge Helm, in the case of Armstrong *vs.* Lower, 6 Colo., 395, made the following analogous exposition of the same principle:

"The essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode or ledge of mineral-bearing rock in place. But, if the relocator finds such vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid relocation thereon, though such finding is not a disclosure of some-

thing that 'existed before but remained unknown,' and therefore, technically perhaps, does not constitute a discovery."

Not a single authority can be found within the reports to contradict, dispute, modify, or even limit the force of the decisions we have referred to above.

The first and primary inquiry in contests over the possession and right of possession of lode mining claims is a very simple one:

Which one of the contesting claimants was the first in point of time to discover and to know of the existence of a vein or lode of mineral within the limits of the disputed ground?

Certainly, when the inquiry is, as it should be, confined to this narrow limit, these steps become and are very simple. All the obstacles and all the intricacies thrown or intruded into the administration and examination of concrete cases arising in the courts of the great precious mining territory of the United States arise from false conceptions and false constructions of the limitations the various States and Territories of the United States have placed, by their statutory declarations, upon the methods to comply with the short and explicit provision of section 2320, Revised Statutes of the United States, as follows:

"But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

The consensus of opinion of both the Federal and State courts have modified that declaration of the national statute far enough to permit a subsequent discovery to be made validating such a location prior to discovery, where no adverse rights occur.

Two limitations and restrictions have been placed by the statutes of the States of Colorado and of Montana, which have produced technical hindrances and embarrassments in the way of judicial interpretation of the simple prerequisite

of the United States statute requiring a discovery in the limits of the claim.

The Montana original territorial statute required the presence of one wall of the vein, and the State statute requires discovery shaft at least ten feet deep, showing "well-defined crevice or valuable deposit."

The Colorado statute, passed in territorial days, omits mention of the one-wall requirement of the Montana statute, but requires "a discovery shaft ten feet deep, showing a well-defined crevice."

The supreme court of Montana, Chief Justice McConnell presiding, in the case of

O'Donnell *vs.* Glenn, 8 Mont., 248; 19 Pac. Rep., 302, gives a very lucid interpretation of the force to be given to such requirements. We quote:

"It is argued by counsel of appellant that 'to allow the selection at will of any other shaft besides the nominal discovery shaft, when a location is contested, is to leave the whole matter open to uncertainty and doubt, and cause litigation. To allow it would be to allow a fraud upon the law, for, if a man may locate his discovery where there is no vein, he may place it at a point between two veins, when he would legitimately be entitled to but one.' The best answer to this argument is given in the Revised Statutes of the United States, wherein they provide that 'the location must be distinctly marked on the ground, so that its boundaries can be readily traced.' And further, that all 'records of mining claims * * * shall contain * * * such a description of the claim or claims located, with reference to some natural object or permanent monument as will identify the claim.'

"The fundamental mistake in the foregoing argument is that it assumes that a notice on the ground at the point of discovery is necessary when it is not required by law. All that is required is a genuine discovery of a mineral-bearing vein with at least one well-defined wall, and such a description of it in the

declaratory statement of record as will identify it and enable a person to easily trace its boundaries. Can it be said that because a locator of a mine puts up a notice at a shaft which contains no mineral, when he has discovered mineral at another point in the same vein and which is covered by his location, the boundaries of which can be readily traced, and the claim identified, that he cannot hold it for that reason? Certainly not. Such a holding would be to interpolate into the statute an amendment which would lead to most absurd consequences."

The Eulalia location stake and notice and discovery shaft, not over twelve feet deep, were placed, May 30, 1893, not over 400 feet west of the east end line of the Eulalia claim.

The Golden Rod location stake and notice and discovery shaft, not over twelve feet deep, were placed, January 25, 1894, not over 400 feet west of the east end line of the Golden Rod claim.

The two shafts claimed as the discovery shafts under the statutes of Colorado for these two claims were only four feet apart. The discovery notices were placed for each claim at these shafts and at no other place or places. Neither the appellants, plaintiffs below, nor the appellee, defendant below, introduced any evidence to prove a vein in the immediate vicinity of these twelve-foot holes, or even claimed by any of their offers of evidence that a vein or lode existed in those shafts.

To narrow the broad terms of the United States statute "of the discovery of the vein or lode within the limits of the claim located" to a point in a mining claim perhaps six feet by three feet, or a total of eighteen square feet in superficial area, out of the total area of a claim 1,500 feet long by 300 feet wide of an area of 450,000 square feet, is to practically repeal the United States statutes upon the subject of discoveries.

In these two claims, as located, an enforcement of the proposition that the discovery shaft named and claimed by the location certificate must disclose and discover within such shaft a well-defined crevice of rock in place, bearing gold or silver, would render the title to both of these claims absolutely void.

An "ideal location" of a lode mining claim under the Colorado statutes, the decisions of the General Land office, and the Revised Statutes of the United States would be an exact geometrical and mathematical parallelogram having its end and side lines parallel with side lines 1,500 feet long and end lines 300 feet long, and the "discovery shaft" mentioned in section 3152, Mills' Annotated Statutes of Colorado, accurately placed upon the center or middle line of the parallelogram, geometrically and mathematically 150 feet from each side line.

Judge Lindley (sec. 360, 1 vol., 2d edition 1903) says of such location:

> "The 'ideal location' is rarely encountered in the practical mining world but it furnishes a convenient standard with which the every-day location may be compared."

The ideal valid lode discovery shaft must, then, be accurately placed upon the center or middle line of this paral-

lelogram and must contain mineral in place at a depth of ten feet at least from the surface.

In section 345 of the first volume Judge Lindley, in discussing the relationship of the *discovery* to the discovery shaft, says:

"As Mr. Morrison in his Mining Rights tersely states, 'the fact of discovery is a fact of itself' to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location, subsequent to discovery."

In same section 345 he further differentiates:

"When we speak of the discovery shaft, we mean to include in that term the various equivalents provided for by the several State enactments as hereinbefore outlined."

In the same section 345 Judge Lindley, in discussing the necessity of discovery being confined to the discovery shaft, having in view the uncertain and unsatisfactory ruling of the supreme court of Colorado in the case of Beals *vs.* Cone, 27 Colo., 473, and of the court of appeals of Colorado, Fleming *vs.* Daly, 12 Colo. App., 439, this distinguished authority gives us a prophetic intimation of what view the Supreme Court of the United States would take of such a narrow and unreasonable construction of section 3152, Mills' Annotated Statutes of Colorado, in the following significant language:

"In neither of these cases was the court called upon to determine whether the State statute was objectionable on the ground that it conflicted with the requirements of the Federal statute. *It is possible that it would be held invalid on this account.*"

That Judge Lindley is not alone in the view that such a construction of section 3152, Mills' Annotated Statutes of Colorado, would be held invalid as objectionable under the requirements of section 2320, Revised Statutes of the United States, we quote from an opinion of Hon. Henry M. Teller,

who has no living peer as a mining lawyer and is almost the only living member of the Colorado General Assemblies who formed the Colorado, statute under consideration—the act of February 13, 1874. This opinion is in the case of Wight *vs.* Tabor, 2 L. D., 741:

"It is said that the statutes of Colorado, made in pursuance of the authority given by the act of May 10, 1872, require that there shall be a discovery in the discovery shaft. The provision is as follows:

"'By sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show a well-defined crevice.'

"If the legislature of Colorado had authority to require such discovery in the discovery shaft it is by the provision of section 2319, Revised Statutes, May 10, 1872. It may well be doubted whether the legislature of Colorado can attach such a condition to the appropriation of mineral lands, when the national statute only provides for the discovery of mineral within the claim. * * * It is the discovery of mineral that entitles the discoverer to a claim; it is equally meritorious whether discovered in the discovery shaft or in any other part of the surface ground of his claim, as the national statute is silent as to where it shall be found."

Again, in Snyder on Mines, vol. I, sec. 347:

"It has been held that the location must rest upon what is found in the discovery shaft, and that ore found elsewhere would not be sufficient (citing Van Zant *v.* Argentine Co., 8 Fed., 725), but this decision has been departed from, if it can be said that it was ever controlling, and in the later cases, both in Federal and State courts, a locator may abandon the original discovery and rest his claim upon a discovery made subsequent and elsewhere in the claim."

Citing—

Perigo *vs.* Erwin, 85 Fed. Rep., 904.
Silver City M. Co. *vs.* Lowry, 19 Utah, 334.
Brewster *vs.* Shoemaker, 28 Colo., 176.

Again, Snyder on Mines, sec. 353, vol. I, Discovery of mineral elsewhere on the claim:

"As we have already had occasion to remark (*ante*, sec. 347), not to repeat too often, but in order to show the reason of the rule the discovery of mineral elsewhere on the claim, if adopted and taken as and for the discovery, will likewise rescue the location from the failure of title otherwise resulting from loss of discovery. The reason of this rule is obvious and proceeds from the theory that all the law of Congress requires is proof that the ground sought to be claimed as mining ground and sought to be patended as such contains either a lode or vein of mineral-bearing rock in place as applied to lode claims and gold placer or valuable deposit, as herein outlined and defined as applied to other claims, whence it follows that it can make no difference at what point in the claim this discovery is made so long as it demonstrates the truthfulness of the claim and a discovery, although not in the discovery shaft, is sufficient as a basis for a location."

O'Donnell *vs.* Glenn, 8 Mont., 248.

Judge Robert Morrison in the eleventh edition of his Mining Rights, p. 33, discusses the topic, Lode found outside of discovery shafts:

"It has been decided in some of the States that although no lode was found in the discovery shaft, its disclosure elsewhere within the claim before any adverse rights had accrued would validate the claim."

Harrington *vs.* Chambers, 1 Pac., 362.
Aff., 111 U. S., 350.
North Noonday Co. *vs.* Orient Co., 9 M. R., 529; 6 Saw., 299; 1 Fed., 522.

But to the contrary in Colorado under its statute are the cases of—

Van Zant *vs.* Argentine Co.
Terrible M. Co. *vs.* Argentine Co., 4 M. R., 441; 89 Fed., 583.
Aff., 122 U. S., 478.

"The question has been before the supreme court of Colorado in two cases which refer to the point without any satisfactory or consistent ruling upon it."

Beals *vs.* Cone, 27 Colo., 499.
Healy *vs.* Rupp, 28 Colo., 102.

We insert the short opinion of Judge Hallett, which it is claimed by Judge Morrison confines the proof of vein of mineral to the discovery shaft.

HALLETT, District Judge (orally):

"That the plaintiff bringing his action to recover possession of the mining claim, must show a good location in compliance with the statute in respect to locations; *i. e.* he must show in his discovery shaft a vein or lode of valuable ore in rock in place, as well as compliance with the statute in other regards. The miner is not bound to make the first shaft or opening which he may sink his discovery shaft. If after sinking in one place and failing to find a lode, he sinks in another and finds one he may make the second his discovery shaft, on which location may be based; that it is competent for him to make any shaft he may sink his discovery shaft, but it must disclose a lode or vein in rock in place, not simply mineral in a fragmentary condition. A location is held valid only to the extent of the lode which is included within it. If a location is extended beyond the limits of the lode, in so far as it goes beyond the lode it is held invalid for the reason that the location gives no right to the surface except in connection with the lode."

Van Zant or Terrible Min. Co. *vs.* Argentine M. Co.,
5 McCrary, 639; 89 Fed., 583.
Aff., 122 U. S., 478.

On affirmation in the Supreme Court of the United States Justice Field does not discuss the question, confining his opinion to question of dip.

The supreme court of Colorado has practically assumed what we claim is the true and harmonious construction of section 3152, Mills' Annotated Statutes, and section 2320, Revised Statutes of United States.

In the case of Fisher *vs.* Seymour, on appeal twice from the district court of Lake county and reported in

16 Colo., 188, and
23 Colo., 542,

one of the turning points of the case passed upon the question of the validity of the American Flag Lode location, the undisputed evidence in the case being that no vein or lode had been discovered in the American Flag "*discovery shaft,*" but that prior to the location of the Tiger lode a vein and lode had been discovered in the Fisher shaft within the limits and boundaries of the American Flag lode.

On page 546 of the second decision of this case, in 23 Colo. Rep., appears the diagram or map of the claims, which was introduced in evidence on the trial, and an examination of this diagram in connection with the record and decision clearly demonstrates that the only discovery of mineral in place within the boundaries of the American Flag claim was made, not in the so-called American Flag *discovery shaft*, fifty or sixty feet from the south end line of the American Flag claim and 150 feet distant from each side line, as located and recorded, but was made in the Fisher shaft, marked upon the diagram with a large "cross," this shaft being 800 feet from the south end line, 50 feet from the west side line, and 250 feet from the east side line of the American Flag claim as located and recorded, and within its boundaries.

The court says, page 550:

"In this shaft mineral of commercial value was found, this being the only ore at that time disclosed upon either of the claims."

At page 552 the court says:

"An examination of the transcript shows the fact to be established by competent evidence, and undisputed, that a vein of mineral was discovered upon the American Flag

claim prior to the relocation of the Little Tiger lode under the name of the Tiger, and this is sufficient to validate the American Flag location from the date of such discovery."

The discovery of the lode and vein of mineral upon the American Flag claim, about which there was no dispute, was made between the first day of January and the last day of March, 1880, just shortly before the death of Thomas Fisher, which occurred April 10, 1880, as shown by the record, and was made in what is called the Fisher shaft, and is marked on the diagram by a large cross, and was sunk by Mr. Fisher to a depth of forty or fifty feet before his demise, and this Fisher shaft never was the shaft set out in the location certificate of the American Flag claim as the technical discovery shaft, that location certificate having been recorded June 24, 1879, over six months prior to the discovery as made in the Fisher shaft, the distance between the two shafts being not less than 750 feet.

This decision is entirely in line with

O'Donnell *vs.* Glenn, 8 Mont., 248; 19 Pac., 302;
Harrington *vs.* Chambers, 1 Pac., 362;

thus placing Montana, Utah, and Colorado together upon this important point of construction.

Colorado Statutes.

The act of February 9, 1866, of the Colorado territorial statutes was in the following words:

"And the discoverer or discoverers shall, before recording, excavate thereon a shaft at least ten feet deep or deeper, if necessary to find a well-defined crevice, or forfeit all right and title he or they may have acquired by virtue of such discovery."

Taken alone, without other legislation, the legislative intent at that time was in substance:

That the vein or lode must be found by the claimant not less than ten feet below the surface of the earth.

The later legislation of February 13, 1874, adds the word "discovery" in the adjective or qualifying sense and limits its time for sinking the shaft so mentioned to the period before filing the location certificate.

The pertinent sections of the act of February 13, 1874, of the Colorado territorial statute which is the present State statute, are as follows:

"3150. The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

"First. The name of the lode.

"Second. The name of the locator.

"Third. The date of location.

"Fourth. The number of feet in length claimed on each side of the center of discovery shaft.

"Fifth. The general course of the lode as near as may be."

"3152. Before filing such location certificate the discoverer shall locate his claim by:

"First. Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice.

"Second. By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

"Third. By marking the surface boundaries of the claim."

"3154. Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

Construed harmoniously and together, the legislative intent of sections 3152 and 3154 is twofold:

1. That the vein or lode must be found by the claimant not less than ten feet below the surface of the earth, and that it may be disclosed at any discovery shaft, shaft, open cut, cross-cut, or tunnel within the limits of the claim.

2. That the markings of the claim upon the ground must be such that the boundaries can be readily traced.

The first branch of this intent was to conform to section 2320, Revised Statutes of the United States, reading:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located"

and this is exclusively made for the benefit of the United States, so that land cannot be acquired under this law until its character is first ascertained to be mineral.

The second branch provides a form of staking and record which infallibly apprises a junior locator of the presence of the stakes and the recorded claim of a prior locator, and that those going upon the ground may know that others have acquired and claim title thereto.

It is plain, then, that if a vein is actually present and disclosed in an opening or shaft below a depth of ten feet from the surface, necessarily the discovery of the vein and crevice parts of both statutes have been complied with, and all that remains for the locator, "if he has made this discovery or has knowledge of it in any other way," for we can hardly term him a discoverer of a vein disclosed and uncovered many years before, is that he shall have a point of commencement for his newly surveyed claim, and to comply with the statute he must sink a new ten-foot hole, which in the case at bar became in truth and fact only a location shaft; and as in this instance he places it 150 feet from each side line, how can he be said to have failed to comply with both intents of the statute? Indeed, when we consider the location of abandoned fractional claims like the Winter and Pocket

Liner lodes, absolutely surrounded by patented and located claims with positive and determined rights, Mr. McMillen was limited to this line for his discovery shaft if he wished to cover all the ground formerly inclosed in the original Winter lode, as surveyed in 1879. It does not detract from the strength of this position to call the attention of the court to the fact that the junior locator's grantors of defendant in error located their discovery shaft—location shaft; call it what you will—within four feet of the shaft of plaintiffs in error eight months subsequent to the Eulalia location, and maintained it there from January 25, 1894, to March 8, 1895.

Where the narrow technical construction of the objects and purposes of the discovery shaft in mining legislation obtains, you will hear this proposition announced:

"If no discovery need be found within the discovery shaft, it follows logically that there is no need of a discovery shaft."

Plainly such an argument overlooks the equally important requisites of the mining State legislation:

1. A point at which to commence the survey along the center line of the claim and upon each side of the center, which our statute declares to be in the majority of the counties not exceeding 150 feet.

2. A point at which a notice of discovery and claim is placed, with a shaft at least ten feet deep, thus making a permanent opening in the ground to be easily known as the starting point of the survey, this point being used as a monument to tie the corner posts of the claim.

Surely these other uses and purposes of the discovery shaft, as mentioned in the statute, are equally of prime importance in estimating the objects of the requirement.

The following ruling of the district court of the fifth judicial district of Colorado has been uniform and continuous

under all of the judges at different times presiding in Lake county:

"That although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one."

This is the instruction asked by plaintiffs in error of the trial judge and refused. (See R., fol. 36, p. 21.) The instruction in the record is *verbatim et literatim* the same instruction given by the same trial judge in the case of Healy *vs.* Rupp, 63 Pac., 319; 28 Colo., 102, and is mentioned in the opinion. The Mr. Robert B. Estey mentioned as Rupp's lessee of the Canestota lode in dispute in Healy *vs.* Rupp, in whose behalf the instruction was first given by the same trial judge, is the same Robert B. Estey who appears as president of the Ferrum Mining Company. (See R., fol., 290–291, p. 179.)

And this ruling has never permitted the claimant to escape compliance with the other condition of location, having a ten-foot shaft designated in the statute "discovery shaft," from which his survey started on the course of the claim and marking its actual surveyed width and the point where the discovery notice was and is to be placed.

The statute law never contemplates the doing of a useless or foolish thing, and yet it is possible to state a multitude of conditions where such acts would be required from the narrow construction of the uses and purposes of a discovery shaft.

Let us suppose that a shaft has been sunk to a depth of 1,000 feet by parties seeking a vein upon unappropriated mineral ground of the United States; that at the bottom of such shaft a vein of mineral has been encountered; that afterwards no steps are taken to secure a United States pat-

ent, and there is a cessation of the annual labor thereon for a period of ten or twenty years, the property becomes that familiar thing known in all mining territory, "abandoned and jumpable." Upon the dump are the evidences of the mineral vein discovered under perhaps a thousand feet of porphyry, sand rock, shale, lime, webergrits, or perhaps wash. The shaft is filled with water. A prospector comes along who formerly worked in this identical shaft and knew of the discovery and disclosure of this vein at a depth of 1,000 feet. Will it be contended for a moment that he must take out of that shaft the immense volumes of water and sink that shaft ten feet deeper, or be limited to finding another vein in the limits of this claim at ten feet from the surface which he must call his discovery shaft? By no means. The discovery of a vein within the meaning of the United States statute, for all his purposes has been made so that he can adopt it as his own, and the fact that the vein has been found ten feet or more below the surface complies to a dot with the additional legislation of the State of Colorado. He has completed his discovery under the grants of the United States to its citizens as fully and completely as Columbus was entitled to his contract rights in the New World from Ferdinand and Isabella.

Does the record of this case in the trial court and in the supreme court of the State of Colorado show that the express right, title, privilege, and immunity to prove the existence and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location under section 2320 of the Revised Statutes, which says: "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and to prove the discovery and existence of a lode and vein of gold and silver ore within the limits of their Eulalia Lode mining location antecedent to and prior to their location of said ground upon the 30th day of May, A. D. 1893, and the recording of their location certificate upon June 17, 1893,

whether made and discovered by themselves or other parties, and that they knew and claimed, at the time of making their location, that there had been a discovery of a vein or lode within the limits of their location under section 2320 of the Revised Statutes of the United States, was claimed and presented before judgment, and that such express right, title, privilege, and immunity was denied to them, and was the construction put upon sections 3150, 3152, and 3154, Mills' Annotated Statutes of Colorado, adverse to and in opposition to the rights of plaintiffs in error under section 2320 of the said statute of the United States, and was this right and immunity denied by the rulings of the courts and the judgment rendered, and was that the necessary effect in law of the judgment?

Does the record disclose that they were denied the privilege and right to prove the existence of a vein or lode outside of the place and point designated as the "discovery shaft" in their location certificate, recorded June 17, 1893, and within the limits of their Eulalia lode as surveyed, by the construction the said courts placed upon sections 3150, 3152, and 3154, Mills' Annotated Statutes of Colorado, and did such construction conflict with the requirements of the Federal statute, section 2320?

Does the record disclose that the construction placed by these courts on section 3152, Mills' Annotated Statutes, render the said section invalid, in so far as it conflicts with section 3154, Mills' Annotated Statutes, and section 2320, Revised Statutes of the United States? Under such construction, which section of the two sections, 3152 and 3154, is valid under section 2320, Revised Statutes of the United States?

We give the refused instructions asked by plaintiffs in error in the trial court and the excluded testimony of Messrs. Thompson, Connors, Smith, and McInness, with the offers of counsel to prove the discovery of a vein and lode in the Pocket Liner shaft by Samuel McMillen and his

partners in 1879 and 1880, and also to prove the discovery of an ore vein and the shipping of the same in October, November, and December, 1894, from the southeast fraction of the Eulalia lode, 380 feet from the surface, through the Little Vinnie lode. These refusals of instructions and exclusion of testimony were sustained by the supreme court of Colorado, save and except in this, that in its opinion the court stated:

"When the trial court ruled that a valid discovery could not be made from an opening on another claim or Government land, it was error."

We claim that these refusals and exclusions were made against and adverse to the plaintiffs in error's express rights, privileges, titles, and immunities under section 2320 of the Revised Statutes of the United States, as well as a false and inconsistent construction of sections 3150, 3152, and 3154, Mills' Annotated Statutes, against the law and the decisions that should have governed and controlled their rulings and judgment in this case.

INSTRUCTION No. 2.

"The court further instructs the jury that, although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one" (R., fol. 36, p. 21).

INSTRUCTION No. 4.

"The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon the ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock

in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made, of the existence of mineral. And under section 2320 Revised Statutes of the United States, the locator of a mining claim is not required to be the original discoverer of the vein or lode. If at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator" (R., fol. 38, p. 22).

No. 5.

"The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location.

"It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, but it must be known to him and claimed by him in order to give validity to the location" (R., fol. 39, p. 22).

Instruction No. 8.

"The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January, A. D. 1894, the plaintiffs, or their grantors, were in the quiet and undisputed possession of the premises designated in the complaint as the 'Eulalia lode,' claimed by the defendant as the 'Golden Rod lode;' that upon May 30th, 1893, long prior to said 25th day of January, A. D. 1894, plaintiffs or their grantors posted on the surface a plain sign or notice containing the name, 'the Eulalia lode,' the name John Kennedy, the locator, and the 30th day of May, 1893, the date of location; that the plaintiffs or their grantors so marked the boundaries of said Eulalia Lode claim by the erection of six substantial stakes, hewed or marked on the sides in toward the claim and sunk in the ground, one at each corner and one at the center of each side line so as to be readily traced, and that on or about June 17, 1893, and within ninety days of said 30th day of May, A. D. 1893, the

said plaintiffs duly recorded a location certificate containing the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface; and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock in place, bearing gold, silver, or other precious metals, then this constitutes a *prima facie* case for the plaintiffs which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture and the acquisition of a better right or title by the defendant and its grantors."

R., fol. 42, p. 25.

INSTRUCTION No. 9.

"The court instructs the jury that if they believe from the evidence that no lode, ledge or vein of quartz or other rock in place bearing gold, silver or other precious metals had been disclosed and discovered in the discovery shaft of the Eulalia lode or in the shaft known as the Pocket Liner shaft prior to the location of the Eulalia lode upon the 30th day of May, 1893, either by the plaintiffs herein, their grantors or or some of them, or by third parties with the knowledge of such discovery by plaintiffs herein, their grantors or some of them, and if they believe further from the evidence that no lode, ledge or vein of quartz or other rock in place bearing gold, silver or other precious metals had been disclosed and discovered in the Golden Rod discovery shaft or in the shaft known as the Pocket Liner shaft by the defendant or its grantors and if the jury believe from the evidence that the plaintiffs herein their grantors or some of them discovered a vein lode or ledge of quartz or other rock in place bearing gold silver or other precious metals at a depth greater than ten feet below the surface of the earth in the part or portion of said premises as designated by them as the southeast Eulalia fraction prior to any other discovery by defendant or its grantors; you are instructed that such discovery by plaintiffs relates back to the time of the original survey and location of the said Eulalia lode and

enables the plaintiffs and their grantors to hold the claim against all who had not acquired interests in the lode and premises at the time the acts were performed and your verdict will then be for the plaintiffs."

R., fol. 43, pp. 25–26.

EVIDENCE OF THOMAS H. THOMSON.

"Q. Will you state what you found in that shaft in the year 1879?

"Objected to by defendant as incompetent, immaterial and not tending to prove any issue in the case.

"The COURT: Let us hear from you, Mr. Elder, why you want to show what was in that shaft.

"The jury were thereupon excused for thirty minutes.

"Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with his co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed this stake upon that ground claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final, and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc., etc.

"'The COURT: I cannot agree with you. Our statute is clear as to what is required, and it has become almost elementary. You must go either upon the vein and make your discovery or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained.'

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted."

R., fols. 169, 170, pp. 101, 102.

EVIDENCE OF STEPHEN CONNORS.

"Q. Will you state if you remember what were the contents, not the number of ounces, will you state whether that assay showed the presence of gold and silver within that rock that you gave to the assayer."

"Objected to by defendant for a great many reasons, the first one is what occurred in 1879 is immaterial."

"And the court sustained said objection, to which ruling of the court plaintiffs duly excepted."

R., fol. 176, p. 106.

EVIDENCE OF W. L. G. SMITH.

"Q. Will you state if you have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode? A. I did.

"Q. Have you such a map? A. Yes.

"Q. Is this the map, sir?

"Mr. CAVENDER: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"Mr. ELDER: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalia lode from the underground workings of the Little Vinnie lode.

"Second. We offer that in case of the working of the Eulalia lode and the shipping of ore or the discovery of mineral in either the drift, or the stopes above the drift during the period of the year 1894; that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of

this claim upon the ground, and in support of that proposition I desire to call the court's attention to a case within the last year, heard in your honor's court, in which a discovery was made underground from the Price shaft, and in which I believe Mr. Estey was interested, and which discovery was made underground from a shaft formerly upon the conflicting location.

"The COURT: Connected to the surface through their ground in that case, if I remember.

"Mr. ELDER: So there is a connection through the Little Vinnie shaft.

"The COURT: But not through Eulalia ground. You should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work and you should offer it next to prove a discovery.

"Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

"The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it is intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

"Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"The COURT: I hold most emphatically this, *that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.*

"Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"The COURT: There was nothing, as far as I see the evidence now. I may be mistaken. This particular part which you point out which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground,

believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist, 300 or 400 feet under ground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery to constitute a discovery.

"Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property.

"The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalia ground unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

"Mr. ELDER: I would like the court to pass on the assessment work.

"Mr. EWING: We will concede they did $100 worth of work within the boundaries of the claim in the year 1894.

"The COURT: Then you don't need any offer on that point.

"Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the underground workings of the Little Vinnie claim.

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted.

R., fols. 153, 155, 156, 157, 158, pp. 92, 93, 94.

"M. N. McInnis, witness for plaintiff, pp. 58 and 59, Abstract—Miner; have mined upon Breece hill; mined on the Little Vinnie in December, 1894; am familiar with the underground workings of the Little Vinnie, yes, sir, part of it; and familiar with what is known as the 380-foot level of the Little Vinnie.

"Q. Do you know of any work having been done from that level towards the Eulalia Lode claim in the fall? A. We have an upraise; we have a stope there in that level.

"Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

"Objected to by defendant.

"The COURT: What is the purpose of it?

"Mr. ELDER: We are going to prove we shipped ore from that ground.

"The COURT: They will perhaps admit that you did.

"Mr. EWING: No, we will not admit that; but this comes under the same objection.

"And the court sustained such objection.

"The Court has already decided that such a drift does not constitute a discovery.

"To which ruling of the court, plaintiffs, by their counsel, duly excepted."

R., fol. 160, p. 95.

We print portions of the opinion of the supreme court of Colorado upon the two main questions:

"1. The ground covered by the two claims is substantially identical. It was formerly included within the limits of the Winter lode, and a part of it was afterwards embraced within the exterior lines of the Pocket Liner lode. When, in 1893, plaintiffs' grantor went upon the ground, both of these claims were abandoned, and he proceeded to relocate as an abandoned claim the territory theretofore covered by them, and adopted the boundaries and stakes of the Winter location. He sank a discovery shaft to the depth of about 12 feet, and at the alleged point of discovery posted his location stake, and in due time filed for record his location certificate, in which, as we read it, the discovery is designated as in the discovery shaft. At the trial plaintiffs admitted that this discovery shaft did not disclose a well-defined crevice. On the contrary, they conceded that it had not passed through the wash and débris usually encountered upon Breece hill in the Leadville mining district. Notwithstanding that no discovery was in fact made in the discovery shaft, and the further fact that the location, as made, was based upon such alleged discovery, plaintiffs contend that since their grantor, the locator, at the time he sought to appropriate the ground as the Eulalia lode, knew of the existence of a vein within the limits of that claim as surveyed, but several hundred feet distant from the discovery shaft of the Eulalia, which he, together with his co-owners of the Pocket Liner lode, had previously discovered in the process of its develop-

ment, this knowledge was equivalent to an actual discovery by him of a vein within the Eulalia location. That plaintiffs' contention may be correctly stated here, though it involves some repetition, we quote what their counsel said when asked by the trial court his purpose in offering proof of a former discovery and in the Pocket Liner lode:

"'Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen as an owner and a locator of the Eulalia lode knew, at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with the co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground, claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States, and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final, and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth,' etc. And again, in the printed briefs, counsel for appellants says: 'We claim for appellants that the discovery made by one of them—Samuel McMillen—in the Pocket Liner shaft, while the same was being sunk in the years 1879 and 1880, formed a complete compliance and performance of one of the two prerequisites prescribed by the acts of Congress to vest in him the complete possessory title to the Eulalia Lode mining claim, and that his entry upon the 30th of May, 1893, and distinctly marking the said claim on the ground and sinking a discovery shaft over a depth of ten feet completed the other prerequisite to vest the title in him.' That the rulings of the trial court may also correctly appear, we take the liberty of reproducing what the judge said in reply to an attempt on the part of plaintiffs to show a discovery made by them in performing assessment work and doing certain other work subsequent to filing their location certificate. 'You can,' said the judge, 'prove this, if possible—any discovery which you made on that ground. I care not where it is, or in what shaft it is. If you have made a discovery, prove it.' And again: 'If, in 1895, you made a discovery upon that ground, and you claim under that discovery, you may go to work and prove

your claim under that discovery.' From the foregoing it is apparent that learned counsel for appellants (plaintiffs below) contends that mere knowledge by the Eulalia locator of the existence of a vein in the Pocket Liner made his location valid, provided he performed the other statutory acts of location aside from the actual discovery of mineral."

The trial judge was entirely against plaintiffs in error throughout the whole case, and what the supreme court mentions as the apparent fairness is entirely specious. Not one of the offers of material evidence of plaintiffs in error was allowed to be proven or the questions even answered by the witnesses.

Our contention was that Mr. McMillen's knowledge of the presence and existence of a vein of gold and silver ore in the Pocket Liner shaft on the day he set his stake and commenced his work of location and survey, May 30, 1893, was of the widest and most extensive character ever used by any of the learned judges who have expressed the term, and it could not be otherwise, since Mr. McMillen was upon the ground in 1879 and 1880, when the iron-stained quartz, talc, and vein material was coming out of the Pocket Liner shaft. We used it advisedly in as strong a form as Judges Sawyer, Hawley, and Ross, of the United States bench, and Justices McFarland, Bartch, and McConnell, of the supreme courts of California, Utah, and Montana, in the cases where this doctrine is announced and discussed. We are mindful of the fact that this would not avail plaintiffs in error if the point of occurrence of the lode in the Pocket Liner shaft did not exceed ten feet below the surface.

We recognize the authority of the laws of the State of Colorado in the matter of survey, staking, recording of location certificates, and the necessity of a discovery shaft, but we also concede to the appropriator the right to prove a prior discovery in, at, and within any part of the superficial and underground surface of the ground within his location boundaries; and we further contend that the two sections of

the Colorado statutes, 3152 and 3154, Mills' Annotated Statutes, can be harmoniously construed to that effect in full accord with section 2320, Revised Statutes of the United States. The mining laws are beneficial laws. They should not be, and are not by the United States Supreme Court, construed technically. The history of the laws shows, as well as the constructions of the Supreme Court of the United States upon them, that they were intended to afford to the miner the most simple method possible of discovery, appropriation, and development.

"It has been held that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location. If it appear that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, he may base his location upon it, and thus avoid the necessity of making a discovery for himself. The following are some of the cases: Book *v.* Justice Mining Co. (C. C.), 58 Fed., 106, 108; Jupiter M. Co. *v.* Bodie Cons. M. Co. (C. C.), 11 Fed., 666; 7 Sawy. 96; Conway *et al. v.* Hart, 129 Cal., 480; 62 Pac., 44; Hayes *v.* Lavagnino, 17 Utah, 185; 53 Pac., 1029; Werner *v.* McNulty, 7 Mont., 30; 14 Pac., 643; O'Donnell *v.* Glenn, 8 Mont., 248; 19 Pac., 302; Nevada Sierra Oil Co. *v.* Home Oil Co. *et al.* (C. C.), 98 Fed., 673. But as stated by Judge Ross in the Oil Company case, *supra.*, not not only must the locator 'have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location;' that is to say, the locator must claim and adopt such previous discovery as his own, and base his location upon it. In the O'Donnell case, *supra*, the supreme court of Montana, it is true, held that the locator was not confined to the nominal discovery shaft, but might select some other place within the limits of the location, and show a valid discovery there. But that decision, as the opinion clearly shows, was based upon section 2320 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424], which merely provides that 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located,'

and the supreme court of Montana aptly observed that there is no provision for a discovery shaft in the Federal statute or any statute of Montana. The court further said that the fundamental mistake in the argument of counsel that a locator was not permitted to select at will any shaft besides the nominal discovery shaft was 'that it assumes that a notice on the ground, at the point of discovery, is necessary when it is not required by law.' Obviously, had there been in Montana, as there is in Colorado, a statute which specifically declares that the locator shall sink a discovery shaft to the depth of at least 10 feet, showing a well-defined crevice, and shall also post at the point of discovery a location stake, the decision there would have been otherwise. And, whatever our views might be when the question is presented, it is a fair inference from the opinion in that case that where, in States that have provisions for discovery shafts and posting of notices on the ground, like our statute, the locator himself selects the discovery shaft as the one in which the discovery of mineral has been made, and there posts his location stake, and bases his location upon such discovery, he may not, after intervening rights have attached, abandon and disregard the same, neglect to comply with such provisions, and select another discovery upon which his location was not predicated. Now, when tender of proof was made by plaintiffs' counsel of the former discovery, there was no offer to show that it was claimed by their locator or adopted by him as the one on which the Eulalia location was made. For this reason alone the court was justified in refusing to hear the proof offered, for it did not meet the requirements of the decisions in which the doctrine is laid down that a former discovery may be the basis of a valid location. It is true that in tendering instructions plaintiffs submitted one which contained the element of an adoption by the relocator of a former discovery as the one upon which his own location was based. There was no error by the trial court, however, in refusing to give this instruction, because there was no evidence, or offer of evidence, by plaintiffs, that called for it. The fact that plaintiffs' grantor knew and claimed that there had been a former discovery is not equivalent to, nor does it supply the place of, its selection by him as the one on which his location is based, particularly in the light of the declaration in the location certificate that the discovery of

the Eulalia location was made in a discovery shaft in no way connected with, and some hundred feet distant from, the place where the former discovery is said to have been made. It follows from what we have said that plaintiffs have not brought themselves within the doctrine they contend for, and are not in a position to invoke its application to their case as made."

It seems that the trial court below and the supreme court of Colorado are unmindful of the fact that section 2320, Revised Statutes, is the basic principle from which all decisions on discovery must flow, and the supreme court of Montana was acting advisedly when it based its opinion in the O'Donnell case upon section 2320. We could wish in this case that the supreme court of Colorado could also understand its limitations. We challenge the law and the logic of the inference the court has drawn from the posting of the notice; being a final determination of the only point where the locator can prove his discovery from, we claim he has every square foot of the superficies of his claimed location, and every cubic foot of its depth, and that this claim is under section 2320, Revised Statutes.

The court says:

"Now, when tender of proof was made by plaintiff's counsel of the former discovery there was no offer to show that it was claimed by their locator or adopted by him as the one on which the Eulalia location was made."

An effective answer, and one which the supreme court of Colorado is the last body to confute, is that in the case of Treasury T. M. & R. Co. *vs.* Boss, 74 Pac. Rep., 888, supreme court, Colo., the court decided December 7, 1903, that the posting of such notice is not necessary. In that case the turning point of the whole case was upon the absence of the notice at the point of discovery proved in the case. We quote from that opinion:

"That although a valid discovery of mineral was made, and the required discovery work done within the limits

of the Maggie A location before the relocation of the Liverpool, yet the locator of the former did not post, at the point of such second and only valid discovery on the surface of the ground a sign or notice which it is said section 3152 Mills' Annotated Statutes requires shall be done."

In conclusion, the court reversed the finding of the lower court for the Liverpool lode and ordered judgment for the Maggie A lode. Further comment is unnecessary on that branch.

It does not seem to have passed into the mind of the court that Mr. McMillen's discovery work within the lines of his Eulalia claim under the decisions had been accomplished many years before and was fully the equivalent, under the decisions, of any new work he could do.

"2. There is another reason for holding that plaintiffs may not avail themselves of that rule. It appears that they not only do not question the validity of our State statutes which prescribe certain acts as necessary to a valid location, but in their complaint they aver that in the location of the Eulalia lode the provisions of the State, as well as of the Federal, statutes were complied with; and among the instructions which they themselves asked the court to give was one—applicable both to their own and the Golden Rod location—in which was the declaration that, as provided by section 2152, Mills' Annotated Statutes, a valid location of a lode mining claim cannot be made unless the locator sinks a discovery shaft upon the lode discovered to a depth of at least 10 feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice, and unless he posts at the point of discovery on the surface a location stake containing certain designated things. Such being true, plaintiffs certainly cannot now be heard to say that they may at their will disregard these mandatory provisions of State legislation, which they themselves have invoked, for, if we assume their validity (which plaintiffs themselves do not question, and which they declare they have complied with), the discovery shaft must expose the vein upon which the location of the Eulalia lode was based, or at least one vein; and a dis-

covery elsewere within the limits of the claim will not supply its place. Beals *v.* Cone, 27 Colo., 473, 499; 62 Pac., 948; 83 Am. St. Rep., 92. Lindley on Mines, at section 250 (15), says that State courts have uniformly enforced provisions like those of ours concerning discovery shafts and posting of notices, notwithstanding doubts by the Interior Department, as to their validity. See, also, Van Zandt *v.* Argentine M. Co., 8 Fed., 725; 2 McCrary, 159; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S., 478; 7 Sup. Ct., 1356; 30 L. Ed., 1140, and Morrison's Mining Rights (9th ed.), 29. But as already shown, plaintiffs are not questioning their binding force and are not in a position to do so."

We refer to the former portion of our brief for a discussion of this branch of the opinion.

We have unhesitatingly questioned the validity of the court's unwarranted construction of sections 3152 and 3154 of Mills' Annotated Statutes of Colorado, for the reason that one statute must fail under the court's construction and that is section 3154. By the holding of the court in this very case section 3154 was not construed with section 3152. The court gives no reason for its selection of the most technical part of this act of February 13, 1874, as the one to be most rigidly enforced. We have before said, and say now, that a harmonious construction of the two sections together can bring them in consonance with the liberal terms of section 2320, Revised Statutes of the United States, and we do now challenge the validity of section 3154 as construed by the Colorado supreme court as invalid in its conflict with section 2320, Revised Statutes of the United States. It is just such narrow, strained, and contracted constructions that have filled the courts of the mining States with protracted and indefinite litigation.

The actual steps of location, discovery, and appropriation of mining claims are very simple; the intricacies are those found in the constructions made by the courts of the States and Territories wherein mineral lands are situated. The Supreme Court of the United States has time and again

cleared away a vast amount of technicality sought to be thrown around these laws, as a careful perusal of the decisions of that court will show.

"3. From what has already been stated, it is clear that the trial court did not preclude plaintiffs from showing a valid discovery of mineral within the limits of the Eulalia location before the rights of defendant attached, though from a superficial examination of the record the contrary might appear. The assertion that defendant has failed to establish a valid location is not borne out by the evidence. Defendant's proof in that behalf is amply sufficient to show a valid location, assuming, as the record justifies, that plaintiffs' location was invalid."

We fear that the court failed to catch our reference to what might have occurred if the jury had been sent down the east drift of the Pocket Liner shaft, where these magnificent Marconi wireless selvages and cracks in the rock were imagined into veins.

All through this opinion we find the court inferentially claiming that plaintiffs in error never adopted the discovery of the vein in the Pocket Liner shaft. We say now, without any fear of contradiction, that no higher force of adoption could be made than by surveying the claim, posting a notice on it at the central fraction of the three pieces and filing a location certificate, and then, when their title is challenged by a jumping junior locator, instead of hiding behind a proneness to file additional and amended location certificates, coming into court and proving an opened and discovered vein in the claim which one of their number discovered over thirteen years before. Do the surveyor's stakes which plaintiffs in error placed about the claim mean no definite adoption and appropriation of every foot of the ground, and does their recorded location certificate carry no notice of their claim?

Second. Plaintiffs in error were entitled, under section 2320 of the Revised Statutes of the United States and section

3154, Mills' Annotated Statutes, to introduce evidence to prove that in September, October, November, and December, 1894, they drove a drift from the workings of the Little Vinnie Lode mining claim at a point 380 feet from the surface of the earth into the southeast fraction of their Eulalia claim a distance of over 64 feet, and also constructed and opened certain upraises and stopes within the limits of their Eulalia location where they discovered, disclosed, and opened a large and valuable vein of gold and silver bearing ore in rock in place, and from this vein shipped large quantities of gold and silver bearing ore to the smelters, and that the refusal of the trial court to permit such proof and the ruling of the supreme court of Colorado in sustaining such refusal put a construction upon section 3152, Mills' Annotated Statutes, in direct conflict with section 2320 of the Revised Statutes of the United States, which says:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located,"

which was adverse to and in opposition to the rights of plaintiffs in error under said statute and in direct contravention of plaintiffs in error's express right, title, privilege, and immunity under said statute to prove the existence, presence of, and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location; and that construction, in so far as it was based upon section 3152, Mills' Annotated Statutes of Colorado, rendered the same nugatory, invalid, and objectionable to section 2320 of the United States Revised Statutes, and that such ruling was also in contravention of their vested rights under section 3154, Mills' Annotated Statutes of Colorado, which is section 2403, page 733, General Statutes of Colorado, 1883, which reads as follows:

"Any open cut, cross-cut, or tunnel which shall cut a lode at the depth of 10 feet below the surface, shall hold such

lode the same as if a discovery shaft was sunk thereon, or an adit of at least 10 feet in and along the lode from the point where the lode may be in any manner discovered shall be equivalent to a discovery shaft."

Evidence Introduced to Prove Underground Discovery.

"W. L. G. Smith, being called as a witness for the plaintiffs and duly sworn, testified as follows:

"Direct examination by Mr. Elder:

"Q. Mr. Smith, what is your occupation? A. Mining engineering.

"Q. What was your occupation along about October, November and December and January, 1894 and 1895? A. Mining engineering.

"Q. Were you employed along in about that time to survey along the lines of the Little Vinnie lode what is known as the Eulalia lode? A. I was.

"Q. Who by? A. Ronald Morrison.

"Q. Will you state if you have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode? A. I did.

"Q. Have you such a map? A. Yes.

"Q. Is this the map, sir?

"Mr. Cavender: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words a discovery in one claim cannot be made through the workings of another, that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"Mr. Elder: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe, and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalia lode from the underground workings of the Little Vinnie lode.

"Second. We offer that in case of the working of the Eulalia lode and the shipping of ore or the discovery of mineral in either the drift or the stopes above the drift during the period of the year 1894, that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of this claim upon the ground. And in support of that proposition I desire to call the court's attention to a case within the last year heard in your honor's court in which a discovery was made under ground from the Price shaft and in which I believe Mr. Esty was interested, and which discovery was made under ground from a shaft formerly upon the conflicting location.

"The COURT: Connected to the surface through their ground in that case, if I remember.

"Mr. ELDER: So there is a connection through the Little Vinnie shaft.

"The COURT: But not through Eulalia ground. You should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work, and you should offer it next to prove a discovery.

"Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

"The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it is intended to constitute the discovery. In other words you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

'Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"The COURT: I hold most emphatically this, that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.

"Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"The COURT: There was nothing as far as I see the evidence now, I may be mistaken; this particular part which you point out which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift.

"Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist, 300 or 400 feet under ground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery to constitute a discovery.

"Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property.

"The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalia ground unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

"Mr. ELDER: I would like the court to pass on the assessment work.

"Mr. EWING: We will concede they did $100 worth of work within the boundaries of the claim in the year 1894.

"The COURT: Then you don't need any offer on that point.

"Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the underground workings of the Little Vinnie claim.

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted.

R., fols. 152–158, pp. 91–94.

"M. M. McInnes being called as a witness for the plaintiffs and duly sworn, testified as follows:

"Direct examination by Mr. ELDER:

"Q. What is your occupation? A. Miner.

"Q. Where have you mined in this camp? A. Mined up on Breece hill.

"Q. Where were you mining in December, 1894? A. On the Little Vinnie.

"Q. Are you familiar with the underground workings of the Little Vinnie? A. Yes, sir; part of it.

"Q. Are you familiar with what is known as the 380-foot level of the Little Vinnie? A. Yes, sir.

"Q. Do you know of any work having been done from that level towards the Eulalie lode claim in the fall? A. We have an upraise, we have a stope there in that level.

"Q. Did you see any ore on the line of the Eulalie lode—common line of the Little Vinnie and the Eulalie lode?

"Objected to by defendant.

"The COURT: What is the purpose of it?

"Mr. ELDER: We are going to prove we shipped ore from that ground.

"The COURT: They will perhaps admit that you did.

"Mr. EWING: No, we will not admit that; but this comes under the same objection.

"And the court sustained said objection. To which ruling of the court plaintiffs by their counsel duly excepted.

"The COURT: The court has already decided that such a drift does not constitute a discovery."

R., fol. 195, p. 95.

The offer of the map of the underground workings, Exhibit 24 (R., fol. 153, p. 92), and evidence, M. N. McInnes, was made also in support of and to connect the ore shipped from a lode and vein found in the southeast fraction of the Eulalia claim from the 380-foot level. The court had previously refused to receive in evidence Exhibit No. 1, smelter settlement (R., fol. 75, p. 46); smelter settlement book, Exhibit 10 (R., fol. 102, p. 61); receipt, Exhibit 10 (R., fol. 101, p. 60); control assay certificate, Exhibit 7 (R., fol. 96,

p. 57); weighmaster's bill, sampler's bill, check Union Smelting Co., deposit book Ronald Morrison, daily balance book Leadville savings and deposit bank, and these offers were to connect the ore so shipped with the work upon the vein and lode opened from the 380-foot level of the Little Vinnie lode by Ronald Morrison, one of the plaintiffs in error.

OPINION OF COLORADO SUPREME COURT ON THIS BRANCH OF THE CASE.

"2. Appellants again call to our attention their assignments of error directed against the rulings of the trial court refusing their offer of proof of a discovery within the limits of the Eulalia, made through the underground workings of the Little Vinnie claim. In the original opinion no special reference was made to this position because the radical defects in appellants' proof as shown by their offer and by the record did not seem to us to call for an application of the rules of law invoked. Further investigation, particularly in the light of the oral arguments on this rehearing clearly demonstrates the fallacy of this claim. As we have aleady determined, appellants' location of the Eulalia has no standing at all if based upon a former discovery, made in 1879, or upon the one alleged to be made in May, 1893, at the time they went upon the ground and made their location, and which is admitted to be in the wash which covers the side of the mountain. At the trial, though no such claim is made in the complaint, there was an attempt to show a valid discovery made from the adjoining Little Vinnie lode. When the trial court ruled that a valid discovery could not be made from an opening on another claim or Government land, it was error; but, in view of the facts on which appellants themselves admit their present contention is founded, such ruling was not prejudicial, for the reasons which we now state. If it be granted that such a discovery was made, appellants wholly failed to follow it up by doing the other essential things which we said in Brewster *v.* Shoemaker, 28 Colo., 176; 63 Pac., 309; 53 L. R. A., 793; 89 Am. St. R., 188, should be done in order to perfect an underground discovery. This underground

discovery is said to have been made between the months of September and December, 1894. If so, we fail to see how it can avail the appellants, for earlier in the year of 1894 the appellee, as the jury must have found, and as the evidence abundantly shows, made a valid discovery in the old Pocket Liner shaft within the present boundaries of the Golden Rod location. This discovery, as well as the location based upon it, is prior to that of appellants, whether or not the law requires in such circumstances an amended or additional location certificate to be filed. If the law does not require such filing, appellee's location of the Golden Rod is superior to the Eulalia, for the former is first in point of time; but, if such location certificate must be filed, still appellee must prevail, for appellants have never filed such certificate at all, and appellee, in March, 1895, filed its amended location certificate, in which it bases its location upon the discovery made in the Pocket Liner shaft. It therefore conclusively follows, according to the facts as appellants themselves on the oral argument admit them to be, that there was no prejudicial error on the part of the trial court in rejecting appellants' offer of proof of a subsequent underground discovery, since, if it was made, it was not until after appellee had made a valid discovery and perfected its location of the Golden Rod."

While the supreme court found that it was error for the trial court to hold that a valid discovery could not be made from an opening on another claim or Government land, the court concluded it was not prejudicial error. The two reasons given were:

(1.) That no notice was posted on the surface at the point where the vein was discovered.

(2.) That defendant in error had a prior valid discovery in the Pocket Liner shaft.

We claim that the information which the law requires the owners of the Eulalia lode to give the public was complete when they placed a discovery notice and location notice upon a stake at their discovery shaft, when they marked

their claim distinctly upon the ground by four corner posts and two side center stakes, all correctly marked, and when, upon June 17, 1893, they recorded their location certificate in the recorder's office in Lake county, Colorado.

In the case of

Noyes *vs.* Mantle, 127 U. S., 348,

the Supreme Court of the United States has announced what these acts amount to when ground so located is attempted to be claimed by a subsequent placer locator:

"Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode."

Our supreme court has expressly and conclusively recognized the right of a discoverer of a lode made from an adjoining claim by and through a cross-cut, a tunnel, or a level, the opening to which is entirely off of the ground so located.

The case is

Hall *vs.* Kearny, 18 Colo., 505; 33 Pac. Rep., 373.

No error was found, either by the trial court or the supreme court, in the fact that the vein discovered was found from a cross-cut, tunnel, or level not having its opening upon the surface of the John Randolph claim, so held by such discovery. We quote from Judge Hayt's opinion:

"It is also contended that plaintiffs committed a trespass in locating the John Randolph claim, and for this reason it is sought to invalidate that location. The facts upon which this is predicated are as follows: One James Hall, the owner of a claim adjoining the Nolan-Gilmer claim, had driven a prospecting tunnel for the development of his

claim. Plaintiffs obtained permission from Hall to continue this tunnel for the purpose of developing the Nolan-Gilmer claim. They continued the tunnel across the Nolan-Gilmer patent without finding a lode, but, *upon extending it a few feet beyond the west side line of that location, they did discover a lode, which they located as the John Randolph.* It is claimed that their rights in the tunnel were limited by their contract with Hall, and that any discovery made in the public domain to the west of the Nolan-Gilmer claim would inure to appellant, he being Hall's grantee as to such rights. In other words, it is urged that as the Randolph location had its origin in the discovery in the tunnel, in equity it belonged to Hall. This is entirely outside any issue made by the pleadings. If in fact appellee's license only authorized them to extend the tunnel through the Nolan-Gilmer territory, *this did not prevent them from locating the lode discovered in the tunnel beyond the side lines of said claim,* although this was not contemplated by their license."

In Brewster *vs.* Shoemaker, 28 Colo., 176, the supreme court of Colorado says:

"Certainly there is no requirement of the Federal statute that a vein shall be discovered from the surface. The only requirement in that respect is that the place of discovery shall be within the limits of the claim. Under our statute (Mills' Annotated Statutes, section 3154, General Statutes, 1883, section 2403) where a lode is cut at a depth of 10 feet below the surface by means of an open cut, cross-cut or tunnel, it is the same as if a discovery shaft were sunk on the vein to that depth."

Again, page 180:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate or file a new one."

Having so thoroughly stated our position on the question of these posted notices, we leave that question just where it belongs, saying this: that where a claim of title as lode ground is once made on the ground by posting a notice of claim it is large enough and broad enough to preserve the rights of claimant to any underground veins he may discover within his location.

The second reason given by the court—that defendant in error had a prior valid discovery—is not borne out by the record and evidence in the case.

In the original opinion in this case the supreme court labored manfully that the plaintiffs in error should not be allowed to prove their knowledge and claim of an ore vein in the Pocket Liner shaft at the date of their location and record of their location certificate, June 17, 1893, for the reason that in that location certificate plaintiffs in error had based their location and designated their discovery shaft as near the Winter discovery shaft, some 400 feet from the east end line of the claim. By the time he had demolished the claim of title of plaintiffs in error by such excellent reasoning, and when the petition for rehearing was being considered, the court suddenly discovered that the Ferrum Mining Company was most certainly in the same dilemma, as in their amended location certificate, filed December 14, 1904, they continued to base their location and designated their discovery shaft in the same place and locality as their first one of January 29, 1904. See Defendants' Exhibit G (R., fols. 290–291, pp. 179–180).

This location certificate, under the first strenuous reasoning of the court, designated their twelve-foot shaft adjoining the location shaft of plaintiffs in error as the actual discovery shaft of defendant in error, and it so continued up to and until March 8, 1895, when the first and original claim of the Pocket Liner shaft as their new discovery shaft was made. Whether such first claim is made by posting notice

or by filing another amended and additional location certificate, it did not antedate March 8, 1895.

There has never been any doubt in the minds of plaintiffs in error that the filing of this amended location certificate was caused by the ascertained fact that plaintiffs in error were working upon their discovered vein and lode from the 380-foot level of the Little Vinnie claim and were shipping pay ore from their Eulalia Lode claim.

We hardly think our claim will be disputed that the underground discovery made in the fall of 1894 by plaintiffs in error, long prior to March 8, 1895, validated any alleged errors or defects in the title of plaintiffs in error to their Eulalia Lode claim, and we believe it will be so adjudged to them.

Third. Plaintiffs in error have pursued their writ under the third clause of the jurisdiction act, section 709.

Section 709, third clause:

"Where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority."

Plaintiffs in error are attempting to hold property under the mining grants of Congress, as the prior and senior locators and appropriators of unsold vacant Government mineral land, and they allege that by a conflict in construction of section 3152, Mills' Annotated Statutes of Colorado, as against section 2320, Revised Statutes of the United States, by the supreme court of Colorado, an express right, title and immunity arising to plaintiffs in error under section 2320, Revised Statutes, has been denied them; that such section 3152, Mills' Annotated Statutes of Colorado, as so construed by the supreme court of Colorado, is invalid and objectionable to said section 2320.

We have set forth at large the matters and things denied plaintiffs in error in the lower courts in the former part of this brief, and as we understand the facts in each case, under the decisions, are the final test of its reviewability, we place the matter in the court's hands.

We believe that upon examination of the record this court will decide to review the judgment of the supreme court of Colorado in this behalf rendered, and that it will find proper and meritorious grounds to reverse the same.

Respectfully submitted,

GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

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JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE STATE OF COLORADO.

~~No. 4215.~~

SAMUEL McMILLEN, RONALD MORRISON, AND EBEN SMITH, APPELLANTS,

vs.

THE FERRUM MINING COMPANY, A CORPORATION, ETC., APPELLEE.

APPEAL FROM THE DISTRICT COURT OF LAKE COUNTY.

BRIEF AND ARGUMENT OF APPELLANTS.

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STATEMENT OF THE CASE.

This was an ejectment suit brought by appellants, plaintiffs below, upon the 20th of November, 1897, as the owners of the Eulalia Lode mining claim, in support of an adverse claim filed in the United States land office at Leadville against the application for patent by the appellee, defendant below, for the Golden Rod Lode mining claim.

The Eulalia Lode mining claim was located upon May 30, 1893, in the name of John Kennedy, by Samuel McMillen and John McCombe, and consisted of three fractional parts of a full mining claim, separated one from the other by a

space of 300 and 400 feet, said tracts being designated in the adverse as Tract A, area one hundred and sixty-five thousandths of an acre (0.165 A.); Tract B, area one acre and seventy-four thousandths of an acre (1.074 A.), and Tract C, area two acres and one thousandth of an acre (2.001 A.). (See plate at page 44 of Abstract.)

The ground embraced in the Eulalia Lode mining claim was the abandoned and forfeited territory inclosed within the lines of the Winter lode, United States survey No. 427, and the surveyed lines of the said Eulalia lode were identical with the lines of the Winter lode, as approved by the surveyor general of Colorado, in its application for patent June 25, 1879.

The ground inclosed within the Winter lode had also been included within the lines of numerous former locations for thirteen and fourteen years prior to the 30th of May, 1893, most of such locations being prior to 1880. The names of some of these claims were the Pocket Liner lode, the Robert Burns lode, the Glengary lode, the Pennsylvania lode, the Eclip lode, the Little Winnie lode, the Comstock lode, the Lowland Chief lode, the Highland Chief lode, the Carlton lode, the Badger Girl lode, and the Howland lode. It is undisputed that the ground embraced in the Eulalia location had been, long previous to May 30, 1893, located and worked as mining ground, and so held by other parties as well as the Winter and Pocket Liner owners. These facts were publicly known at the time the Eulalia lode was located.

Upon the 25th of January, A. D. 1894, Robert B. Estey and Charles T. Limberg, grantors of appellee, entered upon the same identical premises and located their claim, called the Golden Rod claim.

The discovery shafts of the two claims were both located at a point 400 feet west of the east end line of the claims and within a distance of three or four feet of one another. Neither shaft was sunk to exceed a depth of twelve or four-

teen feet, and neither the appellants, plaintiffs below, nor the appellee, defendant below, made claim and introduced evidence in the case that mineral in place had been discovered in either one of said discovery shafts, and the admitted fact was that neither shaft had passed through or below the wash and alluvial debris usually encountered upon Breece hill.

The undisputed evidence was that the discovery notices for both the Eulalia lode, appellants' claim, and the Golden Rod lode, appellee's claim, were posted at these two twelve-foot holes designated by them as their original discovery shafts, and that no other or different notices were ever placed at any other point upon the surface of these two contested claims by either the appellants or appellee, or their grantors.

Appellants' title to the Eulalia lode was based upon the following positions:

1. That upon the 30th of May, A. D. 1893, Samuel McMillen, one of the locators and owners of the Eulalia Lode mining claim and one of the appellants herein, plaintiffs below, had, prior to that date, discovered within the limits of his said location, the Eulalia lode, a vein and lode of mineral, bearing gold and silver, and knew at the time of making his location upon the said 30th of May, A. D. 1893, that there had been a discovery of a vein or lode within the limits of his location; that this vein and lode then existed and was disclosed in what has been termed in this suit the Pocket Liner shaft, a shaft sunk by Samuel McMillen and his co-owners of the Pocket Liner lode, in the years 1879 and 1880, to a depth of 125 or 130 feet; that at a point 75 or 80 feet from the surface a vein and lode of gold and silver bearing ore was disclosed and opened by the said Samuel McMillen and his co-owners, which was over a foot thick, with distinct walls, having a course 61 degrees east and dipping 69 degrees to the west, passing out of said shaft

at a point about 120 feet from the surface; that the said Pocket Liner shaft was situated some 750 or 800 feet west of the point on the surface of the Eulalia lode where the discovery stake and notice of discovery were placed by the said Samuel McMillen and his co-locators of the Eulalia lode upon the 30th day of May, 1893, and that said Pocket Liner shaft and the vein disclosed and discovered therein was, were, and are within the lines and limits of the Eulalia lode, and that said discovery was claimed by the said McMillen as his discovery of the Eulalia lode; that the title of the Pocket Liner lode had lapsed and become forfeited for failure to do the annual labor by the owners thereof, and that on the 30th day of May, 1893, the territory contained within the lines and limits of the said Eulalia lode was unappropriated and vacant mineral land of the United States.

2. That during the summer and fall of the year 1894 the appellants Ronald Morrison and Samuel McMillen and their then co-owner, John McCombe, opened, disclosed, and discovered by drifts, upraises, and stopes from the 380-foot level of the Little Vinnie Lode mining claim, a lode claim adjoining the Eulalia Lode mining claim upon the east, a vein, lode, and ledge of gold and silver bearing ore within the limits of the Eulalia Lode mining claim, and shipped therefrom large quantities of valuable gold and silver bearing ores; that said mineral and ores were taken from a vein, lode, and ledge of mineral in rock in place within the limits of the Eulalia Lode mining claim, and at a point over ten feet below the surface of said claim, viz., being three hundred and eighty (380) feet from the surface of the earth, ore shipped from the said vein or lode containing five and four-tenths (5.4 oz.) ounces silver and one (1 oz.) ounce gold per ton, gross value twenty-two and six-hundredths ($22.06) dollars per ton.

3. That during the summer and fall of the year 1895, while in the performance of the annual labor upon the Eulalia Lode mining claim, these appellants, Samuel McMillen, Ronald Morrison, and Eben Smith, drove a drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface, not less than ten feet in length, and that said drift was driven upon a vein, lode, and ledge of mineral.bearing gold and silver, having well-defined walls of rock in place; that this was and is the same vein discovered, opened, and disclosed by the said Samuel McMillen and his co-owners when the said Pocket Liner shaft was first sunk, and is the same vein known and claimed by him to have been discovered and existing upon the 30th day of May, 1893, the date he set the first stakes and discovery notice of the said Eulalia Lode mining claim.

4. That during the fall of the year 1898, while in the performance of the annual labor upon the Eulalia Lode mining claim, these appellants, Samuel McMillen, Ronald Morrison, and Eben Smith, continued their drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface, a distance of over ten feet, upon a vein, lode, and ledge of mineral bearing gold and silver, having well-defined walls of rock in place; that this was and is the same vein discovered, opened, and disclosed by the said Samuel McMillen and his co-owners when the said Pocket Liner shaft was first sunk, and is the same vein known and claimed by him to have been discovered and existing upon the 30th day of May, 1893, the day he set the first stakes and discovery notice of the said Eulalia Lode mining claim.

5. That during the fall of the year 1899, while in the performance of the annual labor upon the Eulalia Lode mining claim, these appellants, Samuel McMillen, Ronald Morrison, and Eben Smith, continued their drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from

the surface to a distance of 39 feet from the shaft, upon a vein, lode, and ledge of mineral bearing gold and silver, having well-defined walls of rock in place; that this was and is the same vein discovered, opened, and disclosed by the said Samuel McMillen and his co-owners when the said Pocket Liner shaft was first sunk, and is the same vein known and claimed by him to have been discovered and existing upon the 30th day of May, 1893, the day he set the first stakes and discovery notice of the said Eulalia Lode mining claim.

Appellee's title to the Golden Rod lode was based upon the following positions:

1. That upon the 25th day of January, A. D. 1894, Charles T. Limberg and Robert B. Estey entered upon the premises in dispute and sunk a discovery shaft to a depth of ten or eleven feet, within four feet of the discovery shaft of the Eulalia lode, calling their claim the Golden Rod lode and placing their discovery notice at that point; that upon the 30th of January, 1894, the said Limberg and Estey leased to Messrs. Charles Slavin and Thomas Walsh, then in possession of the shaft known as the Pocket Liner shaft, their Golden Rod lode; that the lessees, during the year 1894, drove a drift in a southeasterly direction from the said Pocket Liner shaft at a depth of 130 feet from the surface, the drift being 45 feet in length, and opened and disclosed therein six veins, lodes, and ledges of mineral bearing gold and silver in rock in place, their positions and descriptions being as follows:

A. Designated as vein No. 1, four feet from the southeast edge of the shaft, running north 30 degrees east, magnetic dipping 70 degrees west, with both walls porphyry, an inch to an inch and one-half wide, sample assaying 0.5 ounces silver and 0.02 ounces gold.

B. A vein six feet from the edge of the shaft, material assaying 7 ounces silver, .03 ounces gold.

C. A vein fifteen or sixteen feet from the shaft running north, with both walls porphyry, from one-fourth (¼) of an inch to one-half (½) of an inch thick.

D. Designated as vein No. 2, nineteen feet from the edge of the shaft, running northwest and southeast, dipping north 61 degrees east, both walls porphyry, an inch to an inch and one-half wide, sample assaying 0.5 ounces silver, 0.02 ounces gold.

E. Designated as vein No. 3, forty-one feet from the edge of the shaft, running in a northerly direction, dipping to the west, both walls porphyry, an inch to an inch and one-half thick, sample assaying a trace silver, 0.09 ounces gold.

F. Designated as vein No. 4, forty-five feet from the shaft, running north 10 degrees east, magnetic dipping 48 degrees west, both walls porphyry, one to three inches thick, samples assaying no silver, 0.13 ounces gold, and 0.4 ounces silver and 0.11 ounces gold.

It is hardly necessary to state that the trial court absolutely and positively refused to allow appellants, plaintiffs below, to introduce any evidence whatever to the jury sustaining any one of the five positions claimed as the basis for their title.

In rich and striking contrast to his rulings upon the evidence tending to sustain the appellants' case was the easy and generous manner in which the court permitted the appellee, defendant below, to introduce all the evidence they desired to sustain their claims that six veins existed and were disclosed in a drift but forty-five feet long, run in porphyry, and denied appellants' request to send the jury to inspect the mine, and especially the drift, as provided by section 188 A of the Civil Code, their sole resource after the arbitrary rulings of the court.

The instruction as given at the request of the defendant, as appears upon page 270 of the abstract, folios 73 and 74 of the transcript, was a necessary corollary to the evident and

persistent desire of the court to defeat plaintiffs of their title to the premises.

That instruction was as follows:

"The court further instructs the jury that under the pleadings and evidence introduced in this cause the plaintiff cannot recover, and the sole issue presented to the jury is as to whether the defendant or its grantors have made a valid discovery and location upon the Golden Rod claim and performed the necessary work thereon. If the jury believe from the evidence that a valid discovery and location of a mining claim was made by the owners of the Golden Rod claim, and that $100 worth of work was done thereon during the year 1899, then you will find for the defendant."

The conclusion was of course a verdict by the jury against the appellants, plaintiffs below, and for the appellee, defendant below, and it is the judgment entered upon that verdict in favor of appellee for the ground in controversy which appellants seek to reverse by the prosecution of this appeal.

ARGUMENT.

Appellants were entitled to introduce evidence that at and prior to their location of their Eulalia lode, upon May 30, 1893, there had been a discovery theretofore made of a vein or lode of quartz or other rock in place bearing gold and silver, whether made by themselves or other parties, and that they knew and claimed at the time of making their location that there had been a discovery of a vein or lode within the limits of their location.

This error is included in assignments of error numbers one, thirty-one, and numbers seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-three, the first two referring to the exclusion of testimony and the latter

seven covering the refusal to give to the jury instructions numbers two, three, four, five, six, seven, and eight asked for by plaintiffs.

These assignments of error are as follows:

"First. That the court erred in refusing to allow plaintiffs to prove by Thomas H. Thompson the discovery and existence of a vein of gold and silver bearing ore in rock in place in the Pocket Liner shaft within the limits of the Eulalia Lode mining claim prior to the location, staking and survey of the Eulalia Lode claim; and that Samuel McMillen, one of the appellants and plaintiffs below, was one of the owners of the Pocket Liner Lode claim at the time of such discovery and disclosure of said vein, and knew and claimed at the time of the location and staking of the Eulalia Lode claim of the discovery and existence of a vein of gold and silver bearing ore in the Pocket Liner shaft within the limits of his location, the Eulalia Lode mining claim" (page 275, Abstract).

"Thirty-one. The court erred in not allowing Thomas H. Thompson, witness for plaintiffs, to answer the following question:

"'Q. Will you state what you found in that shaft in the year 1879?'" (page 289, Abstract).

The full evidence of Thomas H. Thompson, as far as permitted by the court, and the rulings of the court in refusing to allow further testimony, is contained upon pages 64, 65, and 66 of the Abstract, and is as follows:

"Thomas H. Thompson—Was born in Ireland; my parents were born at Inverness, Scotland; have been in this country about thirty-five years; have been in Colorado about twenty-nine years or twenty-eight years; my occupation in life has been principally mining; am acquainted with the section of the country known as Breece hill; mined first in this State at the Hardscrabble mining district, in Fremont county, in 1872; after that in Rosita, and after that at Francis coal bank at Francisville, near Colorado Springs; then in Leadville; since then in Cripple Creek and in Bonanza; also in Park county, at the Russia mine. I was in California gulch in 1872, in the spring of 1872, and in the fall I went to the Hardscrabble mining district. Yes, sir I located the Pocket Liner claim; the locators and first owners

of the property were Frank McGuire, Terrance Connors, Charles Slavin and myself. There were supposed to be two silent partners in the claim; they were James Joyce and Sam McMillen.

"Q. Will you go on and state who did the location work of the Pocket Liner claim?

"Objected to by defendant as incompetent, immaterial and not tending to establish any issue in this case.

"The COURT: State the purpose.

"Mr. ELDER: The details of locating the claim.

"The COURT: Is that the only claim interested?

"Mr. ELDER: That is the original claim within the lines of which this discovery was made.

"The COURT: I sustain the objection unless Mr. Elder has a further and better reason. I don't see the materiality of any evidence with regard to the Pocket Liner claim; that is not in issue in this case. If you can show me the materiality of it I shall be glad to have you do so.

"A. I was at that time familiar with the lines of the Glengary Lode claim. I had a half interest in the Glengary claim and located the Pocket Liner at the side line of the Glengary at the north side line.

"Q. Will you state what you found in that shaft in the year 1879?

"Objected to by defendant as incompetent, immaterial and not tending to prove any issue in the case.

"The COURT: Let us hear from you, Mr. Elder, why you want to show what was in that shaft.

"The jury were thereupon excused for thirty minutes.

"Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with his co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final, and perfect location of that mining claim, provided he did the other

things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc., etc.

"The COURT: I cannot agree with you. Our statute is clear as to what is required, and it has become almost elementary. You must go either upon the vein and make your discovery or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted."

The assignments of error numbers seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-three were upon instructions based upon the facts to be proved by testimony of such vein and lode excluded in the above ruling and were as follows:

"17. The court erred in refusing to instruct the jury, on request of plaintiffs' instruction No. 2, as follows:

"The court further instructs the jury that, although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one" (page 280, Abstract).

"18. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 3, as follows:

"The court instructs the jury that the essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode or ledge of mineral-bearing rock in place, and if the relocator finds such vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid relocation thereon; though such finding is not a disclosure of something that 'existed before, but remained unknown,' and therefore technically, perhaps, does not constitute a discovery" (page 281, Abstract).

"19. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 4, as follows:

"The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon

the ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made, of the existence of mineral. And under section 2320 Revised Statutes of the United States, the locator of a mining claim is not required to be the original discoverer of the vein or lode. If at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator" (pages 281 and 282, Abstract).

"20. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 5, as follows:

"The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location.

"It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, but it must be known to him, and claimed by him, in order to give validity to the location" (page 282, Abstract).

"21. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 6, as follows:

"The jury are instructed that the following provisions of the statutes of Colorado must be substantially complied with in the relocation, either in part or in whole, of abandoned lode claims.

"The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property" (pages 282, 283, Abstract).

"22. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 7, as follows:

"You are further instructed by the court that only the un-

occupied and unappropriated mineral lands of the public domain are subject to exploration and location. When one has discovered a vein and has fully complied with the law in locating and recording a claim thereon, the territory included within his surface boundaries is segregated from the public domain in so far as all parties except the Government are concerned. The locator is entitled to the exclusive possession and enjoyment thereof until it is forfeited or abandoned; the prospector cannot go within such surface boundaries to prospect for mineral veins, and his act, if he do so, is as much a trespass as though the ground were patented. To make a valid location the prospector must discover a vein or lode or deposit upon the unoccupied and unappropriated public domain. He must then perform certain acts, among which is the sinking of his discovery shaft within the limits of the territory which he has a right to appropriate. He cannot be allowed to sink such shaft upon ground embraced within a prior valid and subsisting location.

"23. The court erred in refusing to instruct the jury, on request of plaintiffs, instruction No. 8, as follows:

"The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January, A. D. 1894, the plaintiffs, or their grantors, were in the quiet and undisputed possession of the premises designated in the complaint as the 'Eulalia lode,' claimed by the defendant as the 'Golden Rod lode;' that upon May 30, 1893, long prior to said 25th day of January, A. D. 1894, plaintiffs or their grantors posted on the surface a plain sign or notice containing the name, the Eulalia lode, the name John Kennedy, the locator, and the 30th day of May, 1893, the date of location; that the plaintiffs or their grantors so marked the boundaries of said Eulalia Lode claim by the erection of six substantial stakes, hewed or marked on the sides in toward the claim, and sunk in the ground one at each corner and one at the center of each side line, so as to be readily traced, and that on or about June 17, 1893, and within ninety days of said 30th day of May, A. D. 1893, the said plaintiffs duly recorded a location certificate containing the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of

at least 10 feet from the lowest part of the rim of such shaft, at the surface, and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock in place, bearing gold, silver, or other precious metals, then this constitutes a *prima facie* case for the plaintiffs, which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture, and the acquisition of a better right or title by the defendant and its grantors."

None of the evidence of the plaintiffs with reference to the existence and disclosure of a vein or lode in the Pocket Liner shaft, within the limits of the Eulalia lode, prior to its location May 30, 1893, was permitted to be presented to the jury. But fortunately a witness called by the defendant disclosed in a clear and concise manner the fact that he, with his coowners of the old Pocket Liner lode, had so discovered a vein and lode some twenty feet above the 113-foot level or first level of the Pocket Liner shaft, and that such discovery was made prior to the 30th of May, 1893.

We quote the testimony of Charles Slavin upon his direct examination by defendants (page 197, Abstract):

"Q. Was there any vein or crevice—vein of mineral in that shaft that you sank down on? A. Yes, sir.

"Q. Where was that vein—where did you begin working on that vein after you got the lease from Mr. Limberg? A. Well, it was right from the first start; the vein dipped to the west and run right out.

"Q. How far did you go down on it before it run out? A. About five feet.

"Q. How large a vein was that? A. It was from six to eight inches.

"Q. In your judgment was it a vein of mineral in rock in place? A. Yes, sir.

"Q. Carrying gold and silver? A. Well, I never had an assay of it.

"Q. Did it carry iron? A. My partners told me that it did.

"Q. From your judgment as a miner was it a vein? A. Yes, sir; the only vein that I know of in the shaft."

Upon cross-examination by the plaintiffs, Mr. Slavin only reiterated his statements as above (pages 200 and 201, Abstract):

"Q. Mr. Slavin, you have testified that you discovered a vein in this shaft in 1897 at or about the first level. Is that correct? A. About twenty feet up from the first level.

"Q. What was the depth from the collar of the shaft to the first level? A. About 127 feet, along there.

"Q. And twenty feet up the shaft you discovered a vein? A. Yes, sir.

"Q. Will you describe to the jury what that vein was, what the material was on each side of the vein? A. I should judge on each side of the vein was birdseye porphyry, as far as I could see, and the vein she run southwest and northeast, and when we got down to this 127 feet she kind of dipped to the west out of the shaft, and we went straight down with the shaft. She was lying to the west and kind of went out of the shaft.

"Q. What did you pass into after going through the vein? A. Porphyry, I should call it.

"Q. How wide was this vein in places? A. From five to eight inches.

"Q. What was it made up of; what did it consist of? A. Kind of black talc and white talc.

"Q. Did you have any other similar veins higher up in the shaft than twenty feet above that level? A. No, sir.

"Q. Was this the only vein in the shaft from the top to the bottom? A. That is all I know of.

"Q. How deep did you sink the shaft from the upper level? A. Well, how deep from there down?

"Q. Yes. A. About 150 feet."

Mr. Boehmer, a witness for the defendants, corroborated the testimony of Mr. Slavin in every particular.

After the court had refused to permit Mr. Boehmer to be interrogated (page 153 of Abstract) as to the veins appearing in the lower drift crossing on their course the upper drift sixteen or seventeen feet above, for some unknown reason, the court allowed the plaintiffs to ask Mr. Boehmer as

their own witness what he saw in the upper drift, which was as follows (page 155, Abstract):

"Q. Describe the drift. A. I found a drift running northeasterly from the shaft for about twelve feet; then the drift turned more northeasterly, about north 60 degrees east, and run for a distance of twenty-eight feet. That last branch of the drift contained a vein similar to the ones down below. It runs in the direction north 61 degrees east and has a dip to the northwest of 69 degrees. It is still found at the breast of the drift.

"Q. What is the average size of that vein? A. The average size of that vein is from four to five inches.

"Q. What is its maximum width? A. About five inches, I should think.

"Q. What is its maximum width at the bottom of the face of the drift? A. It is the same, about four inches.

"Q. What does the material consist of? A. The vein material?

"Q. Yes. A. The vein material consists of soft gouge matter, clay, iron, quartz, and gold and silver.

"Q. What is the foot wall of that vein? A. The same porphyry that is found in the lower level and through this drift."

The conclusion, from the course and dip of this vein as testified to by Mr. Boehmer, and from the course and dip mentioned by Mr. Slavin, and from his evidence that he followed it some distance below this level in the shaft, can be no other than that they were and are one and the same vein.

One of the most comprehensive decisions ever rendered upon mining law is the first leading decision we will cite, upon the question of how far the previous discovery of a vein and the knowledge of the locator of the existence of a lode and vein within the limits of his location previously discovered or disclosed by himself or by some one else and abandoned and unoccupied at the time of his location, consti-

tutes a valid location and compliance with the mining statutes of the United States, is the case of

Book *et al. vs.* Justice Mining Company, 58 Federal Reporter, 106,

decided in the United States circuit court for the district of Nevada, September 18, 1893. Justice Hawley, the justice deciding the case, was and is beyond dispute one of the ablest judges and authorities upon mining law in the entire Rocky Mountain region, and enjoys in a peculiarly high degree the respect of the courts and bar alike for his great learning upon the law of mining rights.

This suit was an action in equity brought by the owners of the Peerless mining location, made by them September 22, 1892, to quiet their title against the Justice Mining Company, who claimed title to the ground under and by virtue of the mining locations known as the "West Justice" and "James G. Blaine" lodes, located the 2d day of January, 1888. These locations were upon Gold hill, Storey county, Nevada, and the ground within the limits of the claims had been located and claimed over and over again by miners and prospectors, being known as valuable mining ground for twenty years prior to the location by the Justice Company, being upon and in close proximity to the great Comstock ledge. In this respect the Eulalia location bears an analogous position to one of the immense Bonanza mines of Colorado, the number four shaft of the Little Jonny mine being but a stone's throw from the southeast Eulalia fraction.

Section twenty (20) of the syllabus of the opinion prepared by the court is as follows (page 109):

"It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location. It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location."

Upon page 128 the court, in its opinion, clearly and forcibly states the foregoing proposition as follows:

"Guided by the best lights at my command, the decisions of courts as to what constitutes a discovery, the definition of a 'vein or lode' within the meaning of the act of Congress, and the testimony contained in the record, I am of opinion that the weight of the evidence preponderates in favor of the defendant.

"It is an undisputed fact that the locators of the West Justice and Blaine locations WERE NOT THE ORIGINAL DISCOVERERS of the vein or lode, but it is *not necessary* that the locators should be the first discoverers of a lode, *in order to make a valid location.* It is sufficient if it is shown that the locators *knew at the time* of making their locations that *there had been a discovery* of a vein or lode within *the limits of the locations* made by them."

Citing Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed. Rep., 666.

We desire to call the court's attention to the close analogy of the facts of the location of the Eulalia lode with those of the facts of the West Justice and James B. Blaine locations, and for that purpose we quote the review of the testimony by Judge Hawley upon pages 121 and 122:

"Upon the part of the defendant, Lyons testified that the northwestern part of the West Justice ground had been worked by miners in 1878 and 1879; THAT HE KNEW that gold and silver bearing rock and earth had been taken out of the cuts that had been made by the miners, who at that time were working upon and claimed the same as mining ground; THAT PRIOR TO MAKING THE WEST JUSTICE LOCATION HE KNEW THAT THERE WAS A LODE WITHIN THE BOUNDARIES OF THAT LOCATION CONTAINING GOLD AND SILVER BEARING ROCK AND ORE. He described the places where the old workings were, and the open cuts which still exist upon the surface of the ground. He further testified that in 1882, when he was foreman of the Justice mine, he let a contract to four men, and that they took out from the open cuts about $800 in gold and silver ore. Other witnesses corroborate his testimony. Harrington testified that before making the Blaine location he was all over the ground and ex-

amined it closely; that he discovered and found quartz rock in place, bearing mineral, within the limits of the Blaine location; that he found holes that had been sunk seven or eight feet long and six feet deep and three or four feet in width in the ground, in which was quartz rock in place; that there were several holes sunk down below the surface in solid rock, in which streaks of quartz and porphyry were found; and that he saw in some of these holes streaks of quartz a foot wide. Other witnesses corroborated this testimony."

The latitude allowed by Judge Hawley in permitting evidence of what occurred upon the ground in 1878 and 1879, over ten years before the location of the West Justice and James G. Blaine lodes, and again in permitting testimony as to the open cuts and trenches and the $800 in gold and silver taken from them in 1882, over six years prior to the location of the West Justice and James G. Blaine locations, all of these acts and all of this work being performed by strangers to the later title, is in refreshing contrast to Judge Owers' hasty, splenetic, and unconsidered ruling in refusing and excluding evidence and testimony going to show that Samuel McMillen, one of the appellants and one of the plaintiffs below, had, in 1879 and 1880, while working with his copartners in the Pocket Liner lode, sinking that shaft, opened, discovered, and disclosed a vein of mineral bearing gold and silver some eighty or ninety feet from the surface and sunk his shaft therein to a depth of twenty-five or thirty feet further. This ruling of Judge Owers as against plaintiffs' rights was all the more unreasonable in that he allowed Charles Slavin, one of the witnesses of the defendant, to testify as to that vein in his direct examination (see pages 195, 196, and 197, Abstract), although the defendants below, appellees, nowhere and at no time in this case base their title upon this vein.

In announcing and applying the principle we are contending for in the case of Book *et al. vs.* The Justice Mining Company, Judge Hawley only followed in the footsteps of a

greater and more distinguished judge, his predecessor in the same district of Nevada upon the United States bench, Judge Sawyer, who announced the same doctrine in the case of The Jupiter Mining Company *vs.* The Bodie Consolidated Mining Company, *11 Fed. Rep., 666*, decided March 12, 1881, in the following language (page 676):

"It is not necessary that the locator should be the first discoverer of the vein, but it must be known and claimed by him in order to give validity to his location."

In the case of The Nevada Sierra Oil Co. *vs.* The Home Oil Co. *et al.*, reported in 98 Fed. Rep., 673, rendered December 18, 1899, Judge Ross, United States circuit judge for the southern district of California, again announces the same principle on page 679, as follows:

"It is also true, as a matter of law, that it is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location."

Citing Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed. Rep., 666, 676.

We claim for appellants that the discovery made by one of them, Samuel McMillen, in the Pocket Liner shaft, while the same was being sunk in the years 1879 and 1880, formed a complete compliance and performance of one of the two prerequisites prescribed by the acts of Congress to vest in him the complete possessory title to the Eulalia Lode mining claim, and that his entry upon the 30th of May, 1893, and distinctly marking the said claim on the ground and sinking a discovery shaft over a depth of ten feet completed the other prerequisite to vest the title in him.

The statement of these preliminary and necessary incidents to acquiring mining titles to lode ground is so clearly stated by Circuit Judge Sanborn in the case of Erwin *vs.*

Perego *et al.*, 93 Fed. Rep., page 611, decided March 6, 1899, that we insert it:

"The acts of Congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-bearing lode, and the distinct marking of the boundaries of his claim, so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but when these requirements have been complied with the land is no longer public, but the possession, the right to the possession and the right to acquire the title are irrevocably vested in the locator."

Citing Rev. Sts., 2319, 2320, 2324.
1 Lindl. Mines, 273, 328, 350.
Book *vs.* Mining Co., 58 Fed., 108.
Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed., 666, 680.
Zollars *vs.* Evans, 5 Fed., 172–175.
McGinnis *vs.* Egbert, 5 Pac., 652; 8 Colo., 41.

In the same case, on pages 611 and 612, there is a discussion upon the order in which the act of discovery and location should take place, and the element of time or priority is only considered when intervening rights appear. The court says (page 611):

"There is no reason to be deduced from the acts of Congress or from the nature of the case why a claim upon which the location was made before the discovery should be held void, while one upon which the discovery was made before the location should be held valid, and the rights of these locators should be left where the Congress established them, valid and vested when both acts have been done, regardless of their order, but void and ineffectual when the rights of others have intervened before either act has been completed. The order in which the statutory requirements for securing a lode mining claim are complied with is immaterial, so long as the rights of others do not intervene before they are

complied with. The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will enure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date."

In the Perego case it seems, like Mr. McMillen, he had made a discovery of a lode inside the limits of another claim upon September 5, 1888, and Perego lost title to his point of discovery by the patenting of the "Gopher claim," a prior location. So did Mr. McMillen and his successors, owners of the Pocket Liner lode, by the approved survey of the Winter lode, United States survey 427, and their failure to adverse, lose the title gained by the discovery of the lode and vein found eighty feet down the Pocket Liner shaft. Perego went outside of the Gopher Claim lines and in 1889 located his Star lode again, and in 1890 he made a new discovery of the lode and sunk a new shaft within the limits of his claim and without the limits of the Gopher, and the court says, at page 612 of the opinion:

"It is not necessary that a locator shall make the first discovery of a vein or lode within his claim. All that the statutes require is that he shall discover the lode within his claim."

When the Eulalia lode was located by John Kennedy for the use of the appellants in this case, on May 30, 1893, both the Winter lode and the Pocket Liner lode had been forfeited for failure to do and perform the annual labor for over twelve or thirteen years, and as a matter of fact the Land Department of the Government only canceled the application for patent of the Winter lode after the protest and hearing had of John Kennedy, owner of the Eulalia lode, *vs.* W. E. Johnston *et al.*, owners of the Winter lode, by letter dated February 24, 1896 (Mineral Law Digest, Kennedy *vs.* Johnston, pp. 96, 135, 216, 227, 245, and 309).

In all these cases the courts permitted contestants to enter into the history of the ground and into the different locations made upon the ground, and in all the cases in the books we fail to find a single one that prohibits a locator from adopting and claiming a vein or lode as his discovery, whether the same was opened and disclosed by himself or others, only insisting that it was then unclaimed and unappropriated, and that the new locator knew of its discovery.

But the United States bench is not alone in announcing and upholding this theory and principle of the law.

California.

In Conway *et al. vs.* Hart, decided by the supreme court of California, August 8, 1900, reported in 62 Pac. Rep., 44, we find a case upon all fours with this one in its facts and to which the court applied the same rule of law which we seek to invoke.

Section 2 of the syllabus is:

"Evidence that, prior to the location of the claim in question, plaintiffs had sunk a shaft twenty-five or thirty feet and had taken from it a considerable amount of quartz rock, which formed a dump, and that rich rock was found, and that in surveying the claim the surveyor measured along the lode line, taking his directions for the course of the vein from a line drawn from the shaft through two or three prospect holes where the ledge was exposed, together with the admission of the contesting claimant that the rock taken out was gold-bearing, is sufficient to show that a gold-bearing lode or vein had been discovered by plaintiffs within their claim at the time the location was made."

In the opinion, page 45, Judge McFarland states the facts more at large, and the court will notice that this claim, too, had been formerly located and worked by the same parties.

"2. We think that there was sufficient evidence to warrant the court in finding that the plaintiffs had discovered a lode before their location in 1894, although the plaintiffs, who

seemed to have taken this fact for granted, could evidently have put the matter beyond a doubt by simply asking any one of their witnesses a direct question upon that subject. They, as before stated, had located this claim several years prior to 1894, and had done a good deal of work on it. They had sunk a shaft twenty-five or thirty feet deep, and had taken from it a considerable amount of quartz rock, which formed a dump. The witness, Heiser, who had worked for plaintiff, testified that some years before the last location he found rich rock on the south end of the claim and informed one of the respondents of this fact, and warned him that the claim was jumpable, and that he afterwards got rock both from the shaft and the dump to show an expert. The witness, Moise, when testifying about measuring the claim, said: 'I measured along the lode line about the middle of May. I measured from the center of the shaft in Bear creek 1,200 feet along the course of the vein so far as I could judge its course. As the ground is all capped, there is no rock in place at the surface. I took my directions for the course of the vein from a line drawn from the shaft through two or three prospect holes on the northern end of the claim, where the ledge is exposed.' And although this was after the location of 1894, still it has a bearing on the question, for the testimony is fairly susceptible of the meaning that the vein was exposed in the shaft *which plaintiffs had sunk several years before their second location.* The plaintiff, Conway, testified—indirectly, to be sure—to his knowledge of the vein at the time of the location, as appears from the following question and answer:

"'Q. What direction does the vein run upon which you posted this notice? A. North and south.'

"The defendant himself, when on the witness stand, testified as follows:

"'Some work had been done south of the shaft in Bear creek, in the direction of my tunnel, that I know of, in 1885 and 1886. It was done almost on my line in the direction of my shaft from the tunnel—between—on the vein. I was there when the work was in progress in 1886. At that time Mr. Conway and Mr. Heiser were working there. That work was inside the boundaries of my claim, probably 300 feet south of my north line. The rock was gold-bearing.'

"Now, there is no doubt whatever that there actually is, and of course at the date of the location was, a gold-bearing

lode there. The appellant so avers in his answer and proves by his testimony, and, considering all the evidence, we cannot say that the court was not warranted in holding that the rock taken by respondents and placed on the dump was not mere float rock, but rock taken from the lode which all admit to be there, *and that consequently respondents knew of the existence of the lode when their location in* 1894 *was made.* The evidence on the point was, of course, not very direct and explicit, but it was sufficient to sustain the finding."

The facts of this California case are almost identical with the facts of the Eulalia location.

The first point of resemblance is the former location of the same ground by the same parties or some of them.

The second point of resemblance is that in each case the work of discovery—that is, sinking a shaft to the lode or vein—was done years before the locations in the California case to a depth of twenty-five or thirty feet, and in the case at bar to a depth of 125 or 130 feet.

The third point of resemblance is that the undisputed fact is present in both cases of the existence of a gold and silver lode and vein in each claim at the date of location and knowledge of the existence of the lode in the minds of the locators, for in each case they were owners in the first location and were personally present when the lodes and veins were opened and discovered.

Just as in the West Justice and James G. Blaine cases in 58th Federal, the trial judge permitted evidence to go to the jury of work upon the ground in the years 1885 and 1886, and also several years prior to the location in 1894, without introducing error into the case or considering, as Judge Owers did in the case at bar, that it was immaterial what Samuel McMillen or his partner, Thomas H. Thompson, found in their 125-foot shaft when they owned the ground as the Pocket Liner Lode claim, and that the proof of a vein in the claim found by McMillen, Thompson, and his partners prior to the 30th of May, 1893, did not tend to establish any issue in the case.

And the supreme court of California had no difficulty in sustaining the prior locator's title and once again sustaining the cardinal principle which governs the conflicting claims of appropriators of mining claims and other rights on the public domain, that, other things being equal, the prior locator prevails. "*Qui prior est tempore potior est jure.*"

UTAH.

The supreme court of Utah, in Hayes *vs.* Lavagnino, 53 Pac. Rep., 1029, upon the 26th of July, 1898, stated the rule in even more unequivocal terms, as stated in paragraphs two and three of the syllabus:

"2. In a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery, *or knowledge* on the part of the locator, before the location was made, of the existence of mineral there."

"3. Under section 2320, Rev. St. U. S., the locator of a mining claim is not required to be the original discoverer of the vein or lode. If at the time of making the location there is the discovery of a vein or lode of quartz, or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator."

Again, the evidence is wonderfully like the evidence excluded by the court below in the case at bar, and it is significant that the appellate court reversed the case exactly for the reasons that should reverse this case, extending the rule to a discovery of mineral made by others prior to the location and by strangers to the record.

We quote from the evidence, page 1031:

"It appears the ground constituting the Gladstone claim was first located in 1878, and work done in sinking the dis-

covery shaft. Thereafter it was several times relocated, under different names, until in January, 1882, when it was located as the Gladstone claim. The parcel of ground thus located extends in a northeasterly and southwesterly direction, being bounded on the northeast by the Revere claim and on the southwest by the Montreal."

Referring to the history of the claim, counsel for the respondent, in his brief, said:

"This fraction of ground now called the 'Gladstone' was first located in 1878. The shaft now used by the appellants for a discovery shaft was then used as a discovery shaft by the then locators."

It is thus conceded that the discovery shaft was sunk before 1882, and therefore whatever mineral strata or vein may be shown to exist there must have been discovered before the location of the Gladstone; and it is but just and reasonable, under the circumstances of this case, to infer that, if a mineralized vein or lode was discovered by the sinking of that shaft, its existence was known to the locators of the Gladstone before the location was made. If a vein or lode actually exists at the point of their discovery, then such discovery would seem to be a substantial compliance with the provisions of section 2320 Rev. St. U. S., which reads:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

This clause of the statute does not require that the locator of the claim must be the original discoverer of the vein or lode. If, then, in this case there was a discovery of a vein, *and knowledge on the part of the locators of metal there*, the locators were entitled to make their location, even though the original discovery was made by some one other than the locators (Jupiter Min. Co. *vs.* Bodie Cons. Min. Co., 11 Fed., 666; Erhardt *vs.* Boaro, 113 U. S., 527). Does, then, the evi-

dence show the existence of a vein or lode within the meaning of the statute? On this point the witness Gibbons, who has known that ground since 1880, testified:

"I know what was shown me as the discovery of the Gladstone. I examined with a view of determining whether or not there is a cropping of the vein there. There are indications of a vein there. There is a shaft down there and some water in the bottom of it. The surface indications on the other side of the shaft are mineralized.

"Q. Were they such indications that a miner would follow in that district, expecting to find a vein? A. Yes, sir.

"Q. Did you ever see any ore taken from there, or any rock taken from the surface? A. Yes, sir.

"Q. Is that the character of the rock, or the outcropping on the surface, where this discovery was shown to be made? A. Yes, sir.

"Q. Would that indicate a mineral vein in that locality? A. Yes, sir; it would to me."

MONTANA.

Again, in Werner *vs.* McNulty, reported 14 Pac. Rep., 643, the supreme court, July 19, 1887, sustained an instruction covering this identical proposition of law. The instruction was as follows:

"It is not necessary that the work by which the vein or lead was discovered and made visible should be made by the locators. *It is sufficient if, at the time of location, the vein or lead is exposed to view, and its existence known by the locator, for these facts would be equivalent to a discovery.*"

Both the lower court and the supreme court in the above case found no difficulty in sustaining the same rule of law, "*Qui prior est tempore potior est jure.*"

The references we have made are surely sufficient to sustain the proposition that knowledge of the existence of a vein within the limits of his location, prior to such location, is a sufficient discovery and disclosure of a vein or lode

under the statutes of the United States and the State of Colorado.

It is a remarkable coincidence that long prior to these decisions we have cited Judge Helm, in the case of Armstrong *vs.* Lower, 6 Colo., 395, made the following analogous exposition of the same principle:

"The essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode or ledge of mineral-bearing rock in place. But, if the relocator finds such vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid relocation thereon, though such finding is not a disclosure of something that 'existed before but remained unknown,' and therefore, technically perhaps, does not constitute a discovery."

To show the fine discrimination of the court in his method of trying cases, we desire to call the court's attention to the fact that instruction No. two (2), page 252 of Abstract, asked by appellants, plaintiffs below, and refused by this impartial judge, is *verbatim et literatim* the same instruction given by the same judge in the case of John Healey *et al. vs.* Albert J. Rupp, a mining adverse case tried April 1, 1898, before the same judge, which is numbered instruction No. 3, and is now before this honorable court for review as No. 4002, transferred from the court of appeals and filed in this court December 30, 1898, and appears on page 102 of the Abstract of Record. The Mr. Robert B. Estey mentioned as lessee of the Canestota lode, in whose behalf the instruction was first given by Judge Owers, is the same Robert B. Estey who appears as president of The Ferrum Mining Company (see pages 209, 210, 211, 212, 213, and 214, Abstract), the appellee, defendant below, in whose interest the said instruction was refused when presented by appellants. Consistency may be found in the "*Grave*," but not in Judge Owers' instructions.

Instruction No. three, refused and cited as assignment of error No. 18, is in the exact language of Judge Helm used in deciding the case of

Armstrong *vs.* Lower, 6 Colo., 395.

Instruction No. four, refused and cited as assignment of error No. 19, is taken almost literally from the decision in the case of

Hayes *et al. vs.* Lavagnino, 53 Pac. Rep., 1029.

Instructions Nos. 3, 4, 5, 6, 7, and 8, assignments of error Nos. 18, 19, 20, 21, 22, and 23, refused by the court as asked by appellants, were all based upon the testimony of the discovery made by Mr. McMillen in the Packet Liner shaft prior to the 30th day of May, 1893, and founded upon the excluded evidence of Thomas H. Thompson. The fact of Charles Slavin, one of defendant's witnesses, establishing the existence and disclosure of this vein only increased the obligation of the court to give these instructions to the jury, if he was at all aware of the rules of mining law and evidence established by Justices Sawyer, Hawley, and Ross, of the United States bench in the cases we have cited, or Justice McFarland, of the California supreme court; Justice Bartch, of the Utah supreme court, and Justice McConnell, of the Montana supreme court, in the cases we have cited.

Not a single authority can be found within the reports to contradict, dispute, modify, or even limit the force of the decisions we have referred to above.

The first and primary inquiry in contests over the possession and right of possession of lode mining claims is a very simple one, and that is the first in point of time to discover and to know of the existence of a vein or lode of mineral within the limits of the location.

Certainly, when the inquiry is, as it should be, confined to this narrow limit, these steps become and are very simple. All the obstacles and all the intricacies thrown or intruded into the administration and examination of concrete cases arising in the courts of the great precious mining territory of the United States arise from false conceptions and false constructions of the limitations the various States and Territories of the United States have placed, by their statutory

declarations, upon the methods to approach the short and explicit provision of section 2320, Revised Statutes of the United States, as follows:

"But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

The consensus of opinion of both the Federal and State courts have modified that declaration of the national statute far enough to permit a subsequent discovery to be made validating such a location prior to discovery, where no adverse rights occur.

Two limitations and restrictions have been placed by the statutes of the States of Colorado and of Montana, which have produced technical hindrances and embarrassments in the way of judicial interpretation of the simple prerequisite of the United States statute requiring a discovery in the limits of the claim.

The Montana original territorial statute required the presence of one wall of the vein, and the State statute requires discovery shaft at least ten feet deep, showing "well-defined crevice or valuable deposit."

The Colorado statute, passed in territorial days, omits mention of the one-wall requirement of the Montana statute, but requires "a discovery shaft ten feet deep, showing a well-defined crevice."

The supreme court of Montana, Chief Justice McConnell presiding, in the case of

O'Donnell *vs.* Glenn, 8 Mont., 248, 19 Pac. Rep., 302,

gives a very lucid interpretation of the force to be given to such requirements. We quote:

"It is argued by counsel of appellant that 'to allow the selection at will of any other shaft besides the nominal discovery shaft, when a location is contested, is to leave the whole matter open to uncertainty and doubt, and cause litigation. To allow it would be to allow a fraud upon the law,

for, if a man may locate his discovery when there is no vein, he may place it at a point between two veins, when he would legitimately be entitled to but one.' The best answer to this argument is given in the Revised Statutes of the United States, wherein they provide that 'the location must be distinctly marked on the ground, so that its boundaries can be readily traced.' And further, that all 'records of mining claims * * * shall contain * * * such a description of the claim or claims located, with reference to some natural object or permanent monument as will identify the claim.'

"The fundamental mistake in the foregoing argument is that it assumes that a notice on the ground at the point of discovery is necessary when it is not required by law. All that is required is a genuine discovery of a mineral-bearing vein with at least one well-defined wall, and such a description of it in the declaratory statement of record as will identify it and enable a person to easily trace its boundaries. Can it be said that because a locator of a mine puts up a notice at a shaft which contains no mineral, when he has discovered mineral at another point in the same vein and which is covered by his location, the boundaries of which can be readily traced, and the claim identified, that he cannot hold it for that reason? Certainly not. Such a holding would be to interpolate into the statute an amendment which would lead to most absurd consequences."

Justice McConnell has stated the exact conditions surrounding the inception of the title of each of these disputing claims. The Eulalia location stake and notice and discovery shaft, not over twelve feet deep, were placed, May 30, 1893, not over 400 feet west of the east end line of the Eulalia claim.

The Golden Rod location stake and notice and discovery shaft, not over twelve feet deep, were placed, January 25,

1894, not over 400 feet west of the east end line of the Golden Rod claim.

The two shafts claimed as the discovery shafts under the statutes of Colorado for these two claims were only four feet apart. The discovery notices were placed for each claim at these shafts and at no other place or places. Neither the appellants, plaintiffs below, nor the appellee, defendant below, introduced any evidence to prove a vein in the immediate vicinity of these twelve-foot holes, or even claimed by any of their offers of evidence that a vein or lode existed in those shafts.

To narrow the broad terms of the United States statute "of the discovery of the vein or lode within the limits of the claim located" to a point in a mining claim perhaps six feet by three feet, or a total of eighteen square feet in superficial area, out of the total area of a claim 1,500 feet long by 300 feet wide of an area of 450,000 square feet, is to practically repeal the United States statutes upon the subject of discoveries. In these two claims, as located, an enforcement of the proposition that the discovery shaft named and claimed by the location certificate must disclose and discover within such shaft a well-defined crevice of rock in place, bearing gold or silver, would render the title to both of these claims absolutely void.

It is just such narrow, strained, and contracted constructions of mining statutes that have filled the courts of the mining States with protracted and indefinite litigation. The Supreme Court of the United States has time and again cleared away a vast amount of technicality sought to be thrown around these laws, as a careful perusal of the decisions of that court will show.

The language used by the court upon page 66, Abstract, in refusing to allow plaintiffs to prove the vein existing and disclosed in the Pocket Liner shaft, and known and claimed by them May 30, 1893, just as opened and disclosed by them in 1879 and 1880, as the discovery of the Pocket Liner lode

is full of the same narrow construction of the Colorado statutes.

"The COURT: I cannot agree with you. Our statute is clear as to what is required and it has become almost elementary. You must go either upon the vein and make your discovery, or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained."

In other words, a finality has been reached, the act of discovery is complete, a vein or lode has been opened in the Pocket Liner shaft, as in the Utah and California cases the vein, quartz, ore, and contact matter shows in masses upon a large dump, it is shown and known that a "known vein," under such decisions of the Supreme Court as—

Noyes *vs.* Mantle, 127 U. S., 348, and
Iron Silver M. Co. *vs.* Mike & Star G. & S. M. Co., 143 U. S., 394,

exists and is disclosed, which limits forever the granting terms of a United States patent for a placer claim upon such ground.

We quote from Noyes *vs.* Mantle, page 354:

"When can it be said that a vein or lode is 'known to exist' within the meaning of the section? In Reynolds *vs.* Iron Silver Mining Company, when first here, the court said that it might not be easy to define the words 'known to exist;' and as it was not necessary to determine whether the knowledge must be traced to the applicant for the patent, or whether it was sufficient that it was generally known, and what kind of evidence was necessary to prove this knowledge, it was better that the questions should be decided as they arise. When the case was here a second time the court said that the language of the section appeared to be sufficiently intelligible in a general sense, and yet it became difficult of interpretation when applied to the determination of right asserted to such veins or lodes, from the possession or absence of knowledge at the time application is made for a patent; and that if a general knowledge of their existence were held sufficient, the inquiry would follow as to what

would constitute such knowledge, so as to create an exception to the grant, notwithstanding the ignorance of the patentee. These suggestions indicated the difficulties of some of the questions which might arise in the application of the statute; but in the present case we think that difficulty does not exist. *Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode.*"

In Iron S. M. Co. *vs.* Mike & Star G. & S. M. Co., 143 U. S., 396 and 397, the court says, along the same lines:

"Was there a known vein at the time of the application for a patent, within the meaning of section 2333? It was not then a located vein or lode, and the case was evidently tried by the plaintiff upon the theory that unless it was a located vein, it was not a known vein, but that, as we have seen, is not a correct interpretation of the statute. It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the Government. The proof abundantly establishes that within the last description the vein was a known vein."

Now, the evidence in the case at bar is sufficient for all time to prevent a placer applicant for patent ever securing a grant from the Government for the lode or vein contents of the ground inclosed within the Eulalia lines, and the discovery of this first vein in the Pocket Liner shaft is, as a matter of fact, established beyond peradventure. Let us now see if common sense applied to the judge's announce-

ment will logically reach his conclusion. He says the Colorado statute requires the party who adopts an old, well-known discovery to do one of two things, which he states as follows:

1. "You must go either upon the vein and make your discovery,"
2. "Or you must go into the shaft in which the vein has already been discovered and do some work."

The incidents and requirements of the Colorado statute of relocation is as follows, quoted from section 3162, Mills Annotated Statutes:

1. By sinking a new discovery shaft.

2. The relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment.

Mr. McMillen went upon the ground of the Winter and Pocket Liner lode claims, which each covered parts of the present Eulalia lode. The Winter discovery shaft was located upon Tract B and about 445 feet from the east end line of the Winter lode. Mr. McMillen placed his discovery shaft forty-five feet east of this old Winter discovery shaft. (See plate, Tract B, page 44, Abstract.) The Winter discovery shaft had been sunk in 1879 something over 200 feet and there were evidences of sulphide ores upon the dump, presumably from veins or crevices found in sinking the shaft. The Pocket Liner discovery shaft was 800 or 900 feet west of the Winter discovery shaft and was located upon Tract C. (See plate, page 44, Abstract, and also see plate page 60, Abstract.) This Pocket Liner shaft was of a depth of 125 feet and was the one in which McMillen was interested in 1879 and in which they had discovered a vein or lode in 1879, the said vein coming in at eighty to ninety feet from the surface and passing out to the westward at 120 to 125 feet. With his knowledge of the existence of the vein he

could do one of the two things—either sink his old Pocket Liner shaft ten feet deeper or sink a new discovery shaft ten feet upon the surface. He chose the latter method, and although he adopted the old discovery made by himself in 1879—and the vein was then already discovered, and he knew it—this wise court requires him to move the only vein and discovered lode he knew of into the narrow precincts of his ten-foot hole required by the Colorado statute to a point 800 or 900 feet away. Is it inconsistent for us to believe with Judge McConnell in the case of O'Donnell *vs.* Glenn, 8 Mont., 248, "that the notice and stake at the shaft which contains no mineral" is sufficient to hold his claim, when he has discovered mineral at another point in the same claim and which is covered by his location?

An enlarged and liberal view of the term discovery shaft, as described by our Colorado statutes and the various decisions of our own State courts and the Federal courts, leads us to the following views:

1. That primarily it intended that the discovery shaft or opening should be a point to commence the survey of the claim from, showing so many feet along the course of the vein upon each side of the shaft upon the course and showing so many feet upon each side of the shaft approximately upon the dip of the vein, and this latter to be entirely for requisite surface ground for proper working. This view and the practice of the United States Land Office practically limits the discovery shaft for purposes of survey to the middle line of the claim upon a strip of ground six or eight feet wide and 1,500 feet long.

When we consider the location of an abandoned claim like the Winter lode, absolutely surrounded by patented and located claims with positive and determined rights, Mr. McMillen was limited to this line for his discovery shaft if he wished to cover all of the ground formerly inclosed in the original Winter lode as surveyed in 1879. When we

state the fact that the Pocket Liner shaft, where the only vein Mr. McMillen had knowledge of upon May 30, 1893, was discovered, was situated only 100 feet from the south side line of the Eulalia lode, it is obvious that he could not adopt that point as his center line, though he could claim and did claim the discovery of mineral contained in that shaft as his compliance with the discovery requisites of the statute, being as it was and is within the limits of his claim.

2. The act of February 9, 1866, of the Colorado territorial statute was in the following words:

"And the discoverer or discoverers shall, before recording, excavate thereon a shaft at least ten feet deep or deeper, if necessary to find a well-defined crevice, or forfeit all right and title he or they may have acquired by virtue of such discovery."

Taken alone without other legislation, the legislative intent at that time was in substance:

That the vein or lode must be found by the claimant not less than ten feet below the surface of the earth.

The later legislation of February 13, 1874, adds the word "discovery" in the adjective or qualifying sense and limits its time for sinking the shaft so mentioned to the period before filing the location certificate.

Now, if the vein is disclosed in an opening or shaft below a depth of ten feet from the surface, necessarily the discovery of the vein and crevice parts of both statutes have been complied with, and all that remains for the locator, for we can hardly term him a discoverer of a vein disclosed and uncovered many years before, is that he shall have a point of commencement for his newly surveyed claim, and to comply with the statute he must sink a new ten-foot hole, and as, in this instance, he places it 150 feet from each side line, how can he be said to have failed to comply with both intents of the statute?

Where the narrow technical construction of the objects and purposes of the discovery shaft in mining legislation obtains, you will hear this proposition announced :

" If no discovery need be found within the discovery shaft, it follows logically that there is no need of a discovery shaft."

Plainly such an argument overlooks the equally important requisites of the mining State legislation :

1. A point at which to commence the survey along the center line of the claim and upon each side of the center, which our statute declares to be in the majority of the counties not exceeding 150 feet.

2. A point at which a notice of discovery and claim is placed, with a shaft at least ten feet deep, thus making a permanent opening in the ground to be easily known as the starting point of the survey, this point being used as a monument to tie the corner posts of the claim.

Surely these other uses and purposes of the discovery shaft, as mentioned in the statute, are equally of prime importance in estimating the objects of the requirement.

The ruling of the district court of the fifth judicial district has been uniform and continuous under all of the judges at different times presiding in Lake county :

" That if a vein or lode of gold or silver bearing ore in rock in place was discovered anywhere within the limits of the claim located, at a depth of ten feet below the surface, the provisions of the United States statutes and the Colorado statutes relating to 'discovery' were fully complied with, and in such case an actual discovery in the discovery shaft was not necessary and a prerequisite."

And this ruling has never permitted the claimant to escape compliance with the other condition of location, having a ten-foot shaft designated in the statute " discovery

shaft," from which his survey started on the course of the claim and marking its actual surveyed width and the point where the discovery notice was and is to be placed.

The statute law never contemplates the doing of a useless or foolish thing, and yet it is possible to state a multitude of conditions where such acts would be required from the narrow construction of the uses and purposes of a discovery shaft.

Let us suppose that a shaft has been sunk to a depth of 1,000 feet by parties seeking a vein upon unappropriated mineral ground of the United States; that at the bottom of such shaft a vein of mineral has been encountered; that afterwards no steps are taken to secure a United States patent, and there is a cessation of the annual labor thereon for a period of ten or twenty years, the property becomes that familiar thing known in all mining territory, "abandoned and jumpable." Upon the dump are the evidences of the mineral vein discovered under perhaps a thousand feet of porphyry, sand rock, shale, lime, webergrits, or perhaps wash. The shaft is filled with water. A prospector comes along who formerly worked in this identical shaft and knew of the discovery and disclosure of this vein at a depth of 1,000 feet. Will it be contended for a moment that he must take out of that shaft the immense volumes of water and sink that shaft ten feet deeper, or be limited to finding another vein in the limits of this claim at ten feet from the surface which he must call his discovery shaft? By no means. The discovery of a vein within the meaning of the United States statute, for all his purposes has been made so that he can adopt it as his own, and the fact that the vein has been found ten feet or more below the surface complies to a dot with the additional legislation of the State of Colorado. He has completed his discovery under the grants of the United States to its citizens as fully and completely as Columbus was entitled to his contract rights in the New World from Ferdinand and Isabella.

In the case of Fisher *vs.* Seymour, on appeal twice from the district court of Lake county and reported in

16 Colo., 188, and

23 Colo., 542,

one of the turning points of the case passed upon the question of the validity of the American Flag Lode location, the undisputed evidence in the case being that no vein or lode had been discovered in the American Flag "*discovery shaft,*" but that prior to the location of the Tiger lode a vein and lode had been discovered in the Fisher shaft within the limits and boundaries of the American Flag lode.

On page 546 of the second decision of this case, in 23 Colo. Rep., appears the diagram or map of the claims which was introduced in evidence on the trial, and an examination of this diagram in connection with the record and decision clearly demonstrates that the only discovery of mineral in place within the boundaries of the American Flag claim was made, not in the so-called American Flag *discovery shaft*, fifty or sixty feet from the south end line of the American Flag claim and 150 feet distant from each side line, as located and recorded, but was made in the Fisher shaft, marked upon the diagram with a large "cross," this shaft being 800 feet from the south end line, 50 feet from the west side line and 250 feet from the east side line of the American Flag claim as located and recorded, and within its boundaries.

The court says, page 550:

"In this shaft mineral of commercial value was found, this being the only ore at that time disclosed upon either of the claims."

At page 552 the court says:

"An examination of the transcript shows the fact to be established by competent evidence, and undisputed, that a vein of mineral was discovered upon the American Flag claim prior to the relocation of the Little Tiger lode under

the name of the Tiger, and this is sufficient to validate the American Flag location from the date of such discovery."

The discovery of the lode and vein of mineral upon the American Flag claim, about which there was no dispute, was made between the first day of January and the last day of March, 1880, just shortly before the death of Thomas Fisher, which occurred April 10, 1880, as shown by the record, and was made in what is called the Fisher shaft, and is marked on the diagram by a large cross and was sunk by Mr. Fisher to a depth of forty or fifty feet before his demise, and this Fisher shaft never was the shaft set out in the location certificate of the American Flag claim as the technical discovery shaft, that location certificate having been recorded June 24, 1879, over six months prior to the discovery as made in the Fisher shaft, the distance between the two shafts being not less than 750 feet.

This decision is entirely in line with

O'Donnell *vs.* Glenn, 8 Mont., 248; 19 Pac., 302;

Harrington *vs.* Chambers, 1 Pac., 362;

thus placing Montana, Utah, and Colorado together upon this important point of construction.

An opposite construction would bring this legislation under the just criticism as made by Senator Teller, then Secretary of the Interior, in

Wight *vs.* Tabor, 2 L. D., 741:

"It is said that the statutes of Colorado, made in pursuance of the authority given by the act of May 10, 1872, require that there shall be a discovery in the discovery shaft. The provision is as follows:

"'By sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show a well-defined crevice.'

"If the legislature of Colorado had authority to require such discovery in the discovery shaft it is by the provision of section 2319, Revised Statutes, May 10, 1872. It may well be doubted whether the legislature of Colorado can

attach such a condition to the appropriation of mineral lands, when the national statute only provides for the discovery of mineral within the claim. * * * It is the discovery of mineral that entitles the discoverer to a claim; it is equally meritorious whether discovered in the discovery shaft or in any other part of the surface ground of his claim, as the national statute is silent as to where it shall be found."

Admitting the apparent inconsistencies of the statute, still when one considers that the prospector and locator can exercise his option upon the two requirements of the statute we can see no objection to his having—

1. A shaft which he calls his discovery shaft, located at the center line of his claim, 150 feet distant from each of his side lines, and sunk a depth of ten feet, being called in his location certificate the discovery shaft, and the starting point for his claimed length and width of his location.

2. Another shaft, an open cut, an adit, or a tunnel, wherein, below a depth of ten feet from the surface, he may make a discovery of a vein and lode of mineral under the statute, the point of discovery being within the boundaries of his claim.

Now, a large part of the ground in the Eulalia location was embraced in the Winter lode, and if we call it a relocation Mr. McMillen had the option of entering that shaft, as well as the Pocket Liner shaft, and yet because he does adopt the other alternative of the relocation statute, he is debarred by the rulings of the trial court from claiming the discoveries of either shaft, one of which was beyond dispute made by his own efforts and expenditure.

The very fact that section 3162, Mills Ann. Statutes, speaks of another discovery shaft for the relocation of abandoned lode claims creates and impresses upon the mind the conclusion that, the discovery having been already complete, such

new shaft is for survey purposes and for notice to othe r would-be claimants.

At one stage of the introduction of plaintiffs' evidence, page 62 of the Abstract, plaintiffs offered in evidence the stock transfer book of the Legal Tender Consolidated Mining Co. to show the ownership by Mr. McMillen of an eighth interest in the Pocket Liner lode, and that he received stock of the company for that interest. The defendants objected, as follows:

"Our objection is that any question of what had been done, or who had owned this Pocket Liner shaft, or the ground that was covered by that, cannot be material."

In answer to that objection, counsel fully apprised the court of the grounds for the offer and its close and material connection with the main issue of the case:

"I want to say to your honor that, under the laws for the location and discovery of mining claims in the United States and the State of Colorado, and the mining States of the United States, the fact of a discovery of ore by a locator in a claim in which he was interested ten or twelve years before, is practical compliance with the statutes of the United States, and we will follow this up by proving an uninterrupted line of decisions by such remarkable judges as Judge Sawyer of the United States circuit court of Nevada and Judge Hawley, that knowledge either on the part of the original discoverer of ore in the shaft, or if he was not an owner in the original claim, that his knowledge is equal, at the date that he places his stake upon the ground to a discovery by the actual working upon the lode itself, and that is the object of the offer to show that Mr. McMillen owned one-eighth interest in the Pocket Liner claim; that ore was discovered in that shaft seventy-five or eighty feet in the shaft, and continued down to the first level 113 or 114 feet deep to the westward in that shaft."

Instruction number seven, refused by the court, was also based upon the evidence ruled out by the court, and states the proposition that an entry upon land held by virtue of a valid

discovery of a vein is as much a trespass as though the ground were patented, and that a subsequent claimant cannot be allowed to sink a shaft upon ground embraced within a prior valid and subsisting location.

The testimony of Mr. McMillen, page 245, Abstract, and Thomas Walsh, pages 246, 247, 248, and 249, establishes the fact that Mr. Limberg, one of the locators of the Golden Rod, had notice, before his discovery shaft was down ten feet and before he had made any effort to work in the Pocket Liner shaft or had filed a location certificate, that the ground was already located and claimed by Samuel McMillen and his co-owners, and that his entry was upon ground already occupied and claimed by other parties.

With this evidence alone it was error to refuse this instruction.

We therefore submit to the court that the trial court committed error in refusing to allow any proof of plaintiffs whatever as to the disclosure and existence of a vein of gold and silver bearing ore in rock in place in the shaft designated as the Pocket Liner shaft within the lines of the Eulalia Lode claim upon the 30th day of May, A. D. 1893, the date Mr. McMillen laid claim to the Eulalia lode by posting his notice, sinking his ten-foot hole, and recording his claim and marking its boundaries, and that Mr. McMillen was one of the owners of the Pocket Liner Lode claim in the years 1879 and 1880, and of his own means and expenditure discovered the vein then and now existing and disclosed in the Pocket Liner shaft, and that he knew of its so existing upon the 30th day of May, A. D. 1893, when he made his location.

And we respectfully submit that the refusal to give the instructions asked covering that state of facts so excluded was error.

We come now to the second, third, fourth, fifth, twenty-fourth, and thirtieth assignments of error.

During the year 1894 the appellants, plaintiffs below

drove a drift from the workings of the Little Vinnie Lode mining claim at a point 380 feet from the surface of the earth into the southeast fraction of their Eulalia claim, a distance of over sixty-four feet, and also constructed and opened certain upraises and stopes; that in these workings they opened and disclosed a large and valuable vein of gold and silver bearing ore in rock in place, and from this vein shipped large quantities of gold and silver bearing ore. The workings may be seen as presented in the map offered in evidence by Plaintiffs' Exhibit 24. (See page 53 of the Abstract.)

Page 51 of the Abstract contains the testimony of W. L. G. Smith and the offer of the map in evidence, and the ruling of the court excluding it follows upon pages 52, 54, 55, 56, and 57:

"W. L. G. Smith—Am a mining engineer; was a mining engineer in October, November and December, 1894, and January, 1895. I was employed by Ronald Morrison about that time to survey along the lines of the Little Vinnie lode, what is known as the Eulalia lode. I have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode.

"Mr. CAVENDER: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"Mr. ELDER: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalia lode from the underground workings of the Little Vinnie lode.

"Second. We offer that in case of the working of the Eulalia lode and the shipping of ore or the discovery of min-

eral in either the drift, or the stopes above the drift during the period of the year 1894; that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of this claim upon the ground, and in support of that proposition I desire to call the court's attention to a case within the last year, heard in your honor's court, in which a discovery was made underground from the Price shaft, and in which I believe Mr. Estey was interested, and which discovery was made underground from a shaft formerly upon the conflicting location.

"The COURT: Connected to the surface through their ground in that case, if I remember.

"Mr. ELDER: So there is a connection through the Little Vinnie shaft.

"The COURT: But not through Eulalia ground. You should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work and you should offer it next to prove a discovery.

"Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

"The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it is intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

"Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"The COURT: I hold most emphatically this, *that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.*

"Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"The COURT: There was nothing, as far as I see the evidence now. I may be mistaken. This particular part which

you point out which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist, 300 or 400 feet under ground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery to constitute a discovery.

"Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property.

"The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalia ground unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

"Mr. ELDER: I would like the court to pass on the assessment work.

"Mr. EWING: We will concede they did $100 worth of work within the boundaries of the claim in the year 1894.

"The COURT: Then you don't need any offer on that point.

"Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the underground workings of the Little Vinnie claim.

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted.

"M. N. McInnis, witness for plaintiff, pp. 58 and 59, Abstract—Miner; have mined upon Breece hill; mined on the Little Vinnie in December, 1894; am familiar with the underground workings of the Little Vinnie, yes, sir, part of it; and familiar with what is known as the 380-foot level of the Little Vinnie.

"Q. Do you know of any work having been done from

that level towards the Eulalia Lode claim in the fall? A. We have an upraise; we have a stope there in that level.

"Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

"Objected to by defendant.

"The COURT: What is the purpose of it?

"Mr. ELDER: We are going to prove we shipped ore from that ground.

"The COURT: They will perhaps admit that you did.

"Mr. EWING: No, we will not admit that; but this comes under the same objection.

"And the court sustained such objection.

"The court has already decided that such a drift does not constitute a discovery.

"To which ruling of the court, plaintiffs, by their counsel, duly excepted."

The offer of the map and the evidence of M. N. McInnis of work in the drift, stopes, and upraises was made also in support of and to connect the ore shipped from a lode and vein found in the southeast fraction of the Eulalia claim from the 380-foot level. The court had previously refused to receive evidence of Smelter Settlement No. 1, page 20, Abstract; Smelter Settlement Book, page 31; Receipt, page 32; Control Assay Certificate, page 26; Weighmaster's Bill, page 25; Sampler's Bill, page 28; Check Union Smelting Co., pages 34 and 35; Deposit Book Ronald Morrison, pages 37 and 38; Daily Balance Book Leadville Savings and Deposit Bank, and these offers were to connect the ore so shipped with the work upon the vein and lode opened from the 380-foot level of the Little Vinnie lode by Ronald Morrison, one of appellants.

Condensing the rulings of the court, we have these two remarkable announcements:

1. You cannot have a secret or concealed discovery from an opening on another claim or on Government land.

2. You cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalia ground

unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same.

We venture the assertion that no other court, either upon the *nisi prius* or appellate bench, has ever advanced such erratic views upon a case so presented.

The use of the words "secret and concealed" by the court announce a proposition that no statute of the United States or of any of the mining States have formulated into words.

The information which the law requires the owners of the Eulalia lode to give the public was complete when they placed a discovery notice and location notice upon a stake at their discovery shaft, when they marked their claim distinctly upon the ground by four corner posts and two side center stakes, all correctly marked, and when upon June 17, 1893, they recorded their location certificate in the recorder's office in Lake county, Colorado.

In the case of

Noyes *vs.* Mantle, 127 U. S., 348,

the Supreme Court of the United States has announced what these acts amount to when ground so located is attempted to be claimed by a subsequent placer locator:

"Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode."

Indeed, if we were to judge from the long and extended experience of those who are familiar with the mining camps of Colorado for forty years, we are driven to the conclusion

that almost every discovery of a new vein or lode of pronounced value, without exception, is kept as a "secret and concealed discovery" without reference to its being found in a discovery shaft, open cut, adit, tunnel, cross-cut, incline, or drift from another adjoining claim, until the discoverer's rights are put beyond jeopardy, and this is always done without violation of any statutory prohibition, for there is none, or in defiance of any decision of the courts, the learned judge of this court to the contrary notwithstanding. What basis the court had for his insinuations we are at a loss to understand, and certainly if we could under the law do annual assessment work by, through, and from the underground workings of the Little Vinnie, there is no authority for prohibiting us from proving a vein, lode, or ledge found in such work.

The second announcement is so puerile and whimsical that we beg the pardon of the court for dwelling upon it. Indeed, it is absolutely and diametrically opposed to the plain, positive, and clear terms of our State statute upon the subject. We quote section 3154, Mills Annotated Statutes, act passed February 13, 1874:

"Any open cut, cross-cut, or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered shall be equivalent to a discovery shaft."

The best definition of the word "cross-cut" is "a short tunnel; a level driven across the course of a vein."

Neither the word "cross-cut" nor the word "tunnel" is limited by a qualifying adjective connecting them by an opening to the surface. The word "cross-cut" is as frequently applied to workings deep in a mine as the surface workings.

Our supreme court has expressly and conclusively recognized the right of a discoverer of a lode made from an ad-

joining claim by and through a cross-cut, a tunnel, or a level, the opening to which is entirely off of the ground so located. The case is

Hall *vs.* Kearny, 18 Colo., 505; 33 Pac. Rep., 373.

No error was found, either by the trial court or the supreme court, in the fact that the vein discovered was found from a cross-cut, tunnel, or level not having its opening upon the surface of the John Randolph claim, so held by such discovery. We quote from Judge Hayt's opinion:

"It is also contended that plaintiffs committed a trespass in locating the John Randolph claim, and for this reason it is sought to invalidate that location. The facts upon which this is predicated are as follows: One James Hall, the owner of a claim adjoining the Nolan-Gilmer claim, had driven a prospecting tunnel for the development of his claim. Plaintiffs obtained permission from Hall to continue this tunnel for the purpose of developing the Nolan-Gilmer claim. They continued the tunnel across the Nolan-Gilmer patent without finding a lode, but, *upon extending it a few feet beyond the west side line of that location, they did discover a lode, which they located as the John Randolph.* It is claimed that their rights in the tunnel were limited by their contract with Hall, and that any discovery made in the public domain to the west of the Nolan-Gilmer claim would inure to appellant, he being Hall's grantee as to such rights. In other words, it is urged that as the Randolph location had its origin in the discovery in the tunnel, in equity it belonged to Hall. This is entirely outside any issue made by the pleadings. If in fact appellee's license only authorized them to extend the tunnel through the Nolan-Gilmer territory, *this did not prevent them from locating the lode discovered in the tunnel beyond the side lines of said claim*, although this was not contemplated by their license."

The brilliant, erratic, and novel conception of the judge of the district court of Lake county, of a "secret or concealed discovery from an opening on another claim or on Government land," seems never to have occurred to such a profound mining lawyer as Robert S. Morrison, counsel for the Moni-

tor Extension lode, claimed by his client, George W. Hail, as an objection and a ban upon the John Randolph discovery; nor did it occur to Chief Justice Hayt or Justices Elliott and Goddard, of the supreme bench, that the trial court had committed error in admitting evidence of such a discovery in a cross-cut or tunnel not having its opening upon the surface of the John Randolph claim.

The above case was an adverse mining case, and no other surface work seems to have been accomplished save and except a ten-foot shaft, a discovery stake and notice, with the usual staking and record of the claim. In fact, the annual assessments for the years 1884 and 1885 seem to have been performed by an incline driven towards the John Randolph claim from the tunnel or cross-cut in which the discovery was made.

No case can be found in the books where a discovery made from outside the limits of the claim by shaft, incline, cross-cut level, or tunnel drift from workings of or upon another claim or vacant Government land has been held invalid, save and except where no location was made upon the surface, no stakes set, no discovery notice, no monuments outlining the claim, and no discovery shaft sunk.

The fact that in the Eulalia case the staking, notice, and record was prior in time to the discovery in the cross-cut drift from the 380-foot level of the Little Vinnie claim is the sole difference between this case and the Hall *vs.* Kearny, 18 Colo., 505, case, and we submit that the compliance of the locators of the Eulalia lode with every requisite of the national and State statutes providing for staking, work, record, etc., was a sufficient notice to all the world, and especially to these jumpers, whom the evidence discloses as having actual personal notice of their claim of title.

We therefore contend that it was manifest error in the court to refuse plaintiffs their undoubted right to prove a vein, lode, and deposit of gold and silver bearing ore in rock in place, found and opened by them in their drift and stopes

from the Little Vinnie workings, and that the refusal to give instruction No. nine, page 259, Abstract, asked for by plaintiffs, and covering this state of facts, was reversible error.

Assignments of error Nos. six, seven, and thirty-two present an extraordinary proposition, which, we dare say, has never reached any appellate tribunal before.

The proposition announced by the court was simply this: That a writ of restitution and an injunction issued in aid thereof, obtained by the defendants, appellees herein, under section 159 of the Code of Colorado, had such force and effect as to prohibit appellants from peacefully entering within the Pocket Liner shaft, a shaft within the lines of their Eulalia claim, such entry taking place peaceably in the continued absence of appellee, and when neither they nor their servants were in possession of the said shaft, the whole ruling of the court having practically the force and effect of trying this ejectment and adverse case in a hearing for a writ of injunction for affirmative relief having the force and effect of a writ of restitution.

It seems that upon the 5th day of January, 1895, appellee brought an action for a writ of restitution under section 159 of the Code against plaintiffs, appellants herein, to have restored to them possession of the Pocket Liner shaft and the ground adjacent to said shaft. The writ was obtained and the appellee, defendant below, was restored to possession and went into possession. The injunction, summons, complaint, answer, and judgment and decree in that action appear in full, pages 69 to 92 of the Abstract. This action served its purpose, appellants retiring and surrendering possession of the shaft to appellee and its agents.

The code provision limits the extent and power of the court in the following manner:

Section 159, Code, line 14:

"The granting of such writ to extend only to the right of possession under the facts of the case in respect to the manner in which the possession was obtained, leaving the par-

ties to their legal rights on all other questions as though no such writ had been issued."

The question arose upon page 68 of the Abstract, where the evidence refused and the ground therefor are stated.

"J. J. Green—Have resided in Lake county a little over twenty years; yes, sir; I worked within the lines of the Eulalia Lode mining claim some time in the fall of 1895. I did that work 113 or 114 feet from the collar of the shaft.

"Q. What did that work consist of?

"Mr. CAVENDER: I wish you would ask the question who he worked for.

"Q. Who did you work for? A. Mr. Sam McMillen.

"Mr. CAVENDER: We object to any further testimony on the ground because at the time that the work was done as alleged, any other work done at that time was in disregard of an injunction issued by this court against the plaintiffs in this case, and they cannot use any work or anything done at that time which was done in disregard and contempt of court in this case. January 19, 1895, is the date of the injunction.

"The COURT: I want to ask the witness, what do you mean by 113 or 114 feet from the collar of the shaft? A. I mean in depth.

"The COURT: You mean down this very identical shaft? A. Yes, sir.

"The COURT: You went down this shaft 113 or 114 feet to do this work you were asked about? A. Yes, sir.

"The COURT: You could not take possession of that shaft in violation of the injunction. I could not allow you to show work on that shaft during the pendency of this injunction.

"The objection is sustained. To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

The operative words of the writ were as follows, pages 70 and 71, Abstract:

"do strictly command you, and each and every one of you, that until the further order of said court, you and each of you, and each of your servants, agents, attorneys, employés and all persons acting under the control, authority or direc-

tion of you, or either of you, the defendants above named, *do absolutely refrain and desist from interfering with the workings* connected with the shaft or with the gallows frame, engine-house and ground immediately surrounding said shaft, or *with the possession* of the plaintiff, its agents, servants and employés, or *from interfering in any way* with the plaintiff, its agents, servants and employés in gaining access to or egress from said shaft. * * * And we do further strictly command you * * * that you *surrender and restore* to the plaintiff, its agents, servants and employés, *possession of the shaft* and *workings thereon.*" * * *

The prayer of the complaint asked for four things, pages 79 and 80, Abstract:

1. Writ of injunction for affirmative relief having the force and effect of a writ of restitution.

2. Temporary injunction from shipping, selling, or disposing of any ore from said premises.

3. For perpetual injunction from working or mining thereon or therein.

4. Temporary injunction from interfering with the workings, shaft, etc.

The court granted the writ of restitution and temporary writ of injunction from interfering with the workings, etc., and refused to grant injunction against working or mining in the premises or shipping ore from the premises.

Our reading of section 159 is that the power of the court is confined simply to restoring the complainant under it to his possession and to enjoining the respondent from interfering with his occupation and possession while he remains there.

The facts were, the plaintiffs in that writ of possession walked away from the shaft after they had been put in pos-

session and remained away continuously, and while they were absent Mr. McMillen and his employés went to work in the shaft, being part of the Eulalia ground, and did their assessment work by running a drift upon the vein at 113 or 114 feet from the surface in the old Pocket Liner shaft. This was done some time in the fall of 1895.

There was no "interference with the *possession* of the plaintiffs in that action," nor were the plaintiffs "*interfered* with in any way in *gaining access to or egress from said shaft*," "and *possession* had been *restored to them*." The injunction was obeyed in all its strictness, and there is no doubt that when plaintiffs in that proceeding removed their tools, machinery, etc., from the shaft and passed out and away from the physical possession of the said shaft, and so continued, the writ was "*functus officii*," and the owners of the Eulalia Lode claim had a right to peacefully enter the said shaft as a part and portion of their claim in the absence of the complainant in that writ and its agents.

It is also a fact that the appellee and its agents actually did or attempted to do their so-called assessment work in the Pocket Liner shaft for the year 1895.

The same question arose upon pages 92, 93, and 94 of the Abstract, when John J. Green, a witness for plaintiffs, was asked with reference to work done by himself in the Pocket Liner shaft, in the years 1898 and 1899, the work being ostensibly assessment work upon the Eulalia lode for those years, and in the course of which over ten feet of drifting was accomplished upon the vein discovered in the Pocket Liner shaft, all of which testimony was refused by the court for the sole reason that the injunction and writ of restitution prohibited appellants, owners of the Eulalia lode, from working in said shaft.

Page 92, Abstract:

"Q. Mr. Green, did you do any work within the lines of the Eulalia claim at the close of the year 1897, and the fore part of the year 1898? A. Yes, sir; I did.

"Q. Where did you do that work, if any? A. In the year 1897?

"Q. No, 1898 and 1899; end of the year 1898 and the year 1899? A. Well, I done that work down the shaft also in that same drift.

"Objected to by defendant for the same reason as before. And the court sustained said objection.

"To which ruling of the court plaintiffs, by their counsel, duly excepted.

"Q. Mr. Green, did you do any work within the lines of the Eulalia claim in the month of November, 1899? A. Yes, sir.

"Q. Who did you do that work for? A. Well, I done that for Sam McMillen.

"Q. Where did you do that work? A. I done it down 113 or 114 feet down the shaft, same drift.

"Objected to by defendant on the same ground as before.

"The COURT: You don't object to his stating where the work was done?

"Mr. EWING: No.

"Q. How far did you do that work from the shaft? A. In 1899?

"Q. In 1899; what distance were you in from the side of the shaft?

"The COURT: Well, it is down the shaft? A. Yes.

"Objected to by defendant.

"Q. What kind of material or rock did you work in?

"Objected to by defendant; it is an attempt to initiate a title.

"And the court sustained said objection.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted.

"Q. What kind of material did you take out of that shaft at the period you worked there in driving that drift?

"Objected to by defendant. Objection sustained.

"Q. Did you see a vein, lode or ledge of mineral rock in place and did you work upon the vein of mineral bearing precious metals in the course of that work?

"Objected to by defendant. Objection sustained.

"To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted.

"Q. If this work in the drift was done upon a vein, lode or ledge, in what direction did this vein, lode or ledge dip?

"Objected to by defendant. Objection sustained.

"To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

If there was any life in the writ of injunction and writ of restitution granted by the district court of Lake county in January, 1895, the peaceful entry by appellants into the Pocket Liner shaft in the years 1898 and 1899, in the absence of appellee, was not interfering with the possession of appellee, and certainly, having restored the possession to appellee in 1895, the restitution part of the code requirement was a completed act. The fact that in each of those years the appellee did his assessment work or attempted to do said work in the same shaft shows that no possible violation of the injunction can be proved against appellants even if the force and effect of such a writ can be so falsely construed.

This section 159 was never intended to extend to restraining or prohibiting a defendant from working any part or portion of his claim, and its limitation is narrowed only to

"*Restoring any person or persons to the possession of any mining property or premises from which he or they may have been ousted by fraud, force or violence, etc.*"

After this has been accomplished and the particular shaft or other workings to which the writ applies become unoccupied by the party leaving, the writ is, as we have said, "*functus officii*," and a peaceful re-entry can be made by the other party owning and claiming title to the same ground. If the construction of this section were otherwise, all that the jumping or junior title to a mining controversy has to do is to smuggle or slip through a writ of restitution but a little broader in its terms and get a court like this one to sustain such a monstrous construction of the writ, and the senior title could do neither assessment work nor discovery work within the lines of the claim.

On page 155 will be found the testimony of Mr. Boehmer, a witness of appellee and adverse to appellants, as to the vein found by appellants when driving that drift thirty-four or thirty-five feet in their assessment work for the years 1895, 1898, and 1899:

"Q. Describe the drift. A. I found a drift running northeasterly from the shaft for about twelve feet, then the drift turned more northeasterly, about north 60 degrees east, and run for a distance of twenty-eight feet. That last branch of the drift contained a vein similar to the ones down below. It runs in the direction north 61 degrees east and has a dip to the northwest of 69 degrees. It is still found at the breast of the drift.

"Q. What is the average size of that vein? A. The average size of that vein is from four to five inches.

"Q. What is its maximum width? A. About five inches, I should think.

"Q. What is its maximum width at the bottom of the face of the drift? A. It is the same, about four inches.

"Q. What does the material consist of? A. The vein material?

"Q. Yes. A. The vein material consists of soft gouge matter, clay, iron, quartz and gold and silver."

Having ruled out the evidence of plaintiffs of the vein herein described in the shaft of the Pocket Liner lode as discovered and disclosed and known to exist May 30, 1893, then the further evidence of the vein found from the 380-foot level of the Little Vinnie lode and from which ore running one ounce in gold and five and four-tenths ounces in silver was shipped and sold to the smelters by appellants, the honorable court very consistently expands an injunction writ issued under section 159 of our Civil Code to exclude all testimony of the work done on the vein and the proof of the vein drifted on by appellants for a distance of not less than thirty-four or thirty-five feet in the several years 1895, 1898, and 1899.

This may be consistency in the general plan of the court

to give the title to this ground to the appellee, but we confidently assert that the supreme court of this State will declare such unwarranted extension of an injunction writ of restitution under section 159 of the Code as plain, reversible error.

In the case of

People *ex rel.* L'Abbe *vs.* District Court of Lake County, July 17, 1899, 58 Pac. Rep., 604,

the supreme court of Colorado has had occasion and opportunity to discuss the large and liberal views of this trial judge upon the extensive limits of the injunction writ, and the severe arraignment given the court for his arbitrary use of the injunctive process of his court in that case is not a whit less deserved in his unwarranted construction of the limits of the writ under section 159 of the Code. He has no precedent for this ruling, and we defy counsel upon the other side to produce a single precedent in any court, whether from such use in a trial court or upon review in an appellate court, to sustain the court's ruling.

His statement in L'Abbe *et al. vs.* District Court from the bench shows his capacity to establish precedents when he once throws away the sheet anchor of a judge, the recorded precedents of the courts.

We quote the announcement of the trial court and the short but stinging comment of the supreme court:

"If it be true that no direct precedent can be found, it is time that one should be created; and, as Murat declared himself to be his own ancestor, this court will be its own precedent. It is time the increased use of injunctions in certain directions should at least be so extended that relief may be afforded in cases like this." "Whether the ancestor was proud of his offspring, or the maker of this precedent is entitled to credit for its creation, is not strictly a legal question. We can only add that this remarkable declaration must speak for itself."

We commend this holding of the trial court upon the construction of the Code, section 159, to the tender mercies of

the supreme court, assured that they will find his conclusion equally barren of legal ancestry, and on a par as to legitimacy of legal precedent with the *pronunciamento* in the L'Abbe case.

We now come to assignment of error No. fifteen, which was as follows, page 280, Abstract:

"15. The court erred in refusing and declining the request and application of plaintiffs to send the jury impanelled in the case in a body to view and inspect the premises, as provided by section 188 A of the Code of Procedure, against plaintiffs' objection and exception saved."

See page 249, Abstract:

"Plaintiffs request that the jury be taken to the premises and given an opportunity to examine the shaft and drifts.

"But the court refused to grant said request and to send the jury to the premises in dispute.

"To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

Page 17 of Abstract:

"Motion of plaintiffs that jury be allowed to view the premises in controversy denied by the court. Excepted to by plaintiffs."

Prior to July 3, 1893, there was no statute in effect making it *mandatory* upon courts of law to permit the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred.

Section 188 of the Code in a general fashion provided a mode and manner for a view of property, but used the words,

"Whenever, *in the opinion of the court*, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, *it may order* them to be conducted in a body * * * to the place," etc.

This provision of the Code was plainly directory and discretionary with the court, and had application to all forms of trials, both in the criminal and the civil branch of the law. It is sweeping and general in its terms and applies to all classes of cases.

In the case of—

Saint *et al. vs.* Guerrerio, 17 Colo., 456,

decided at April term of the supreme court, 1892, it was decided that section 188 was discretionary, as follows:

"It was not error for the court to refuse defendants' request to have the jury view the premises and ditch in dispute. The granting or refusing of such request was a matter resting in the sound discretion of the trial court (Code, section 188)."

Upon April 3, 1893, the legislature passed an act which, as stated in its title, was a special provision for the conduct of courts in the trial of all cases involving *the title to mining property or the mineral therein.*

The title was, Session Laws 1893, page 78:

"An act to provide for the inspection of the premises in dispute by the jury in all cases involving the title to mining property or the mineral therein, and to provide for the expense thereof."

We quote that part of section 1 of the said act, page 78, which made it the duty of the court, and *a mandatory duty,* to send the jury to view and inspect the premises:

"SECTION 1. *In all suits, actions and proceedings now pending, or which may hereafter be brought, in any court of this State, involving the title to, the right of possession of, or the mineral contained in any mine or mining claims, it shall be the duty of the court, at the trial of such suit, upon the application of either party interested therein, to send the jury impanelled in the case, in a body, to view and inspect the premises.*"

This act, as passed April 3, 1893, is absolutely unconnected by any words of reference or description with section 188 of the Code of Civil Procedure, and no mention is made in any way in the act of section 188 of the Code. Mr. Mills, in annotating the Code, placed the two in an apparent close connection by denominating the two sections Nos. 1 and 2 of the act of April 3, 1893, as section 188 A of the Code as annotated by him.

Section 188 is purely and simply a directory and discretionary provision of the code, and has been so declared, as before observed, by our supreme court.

The central controlling expression in section 1 of the act, after limiting the class of cases to those "involving the title to, the right of possession of, or the mineral contained in any mine or mining claim," is

"IT SHALL BE THE DUTY,"

and this becomes by its very terms a grant of a *power*, *a privilege*, and *an immunity*, which it no longer lies within the power of the court to decline or refuse. The formalities and conditions which it prescribes for its acquisition and performance are *imperative* in the sense that non-observance of any of them is fatal to the benefit sought.

Upon application once made to the court for such inspection and view, no discretion remains in the court.

Section 2 of the act has within its lines confirmatory evidence that no objection can be entertained to the view and inspection from the other party to the litigation.

After providing that the expenses "shall be paid by the parties to the suit in equal proportions," the section continues:

"*unless the demand for such investigation shall be made by one party and objected to by the other.*"

No other construction can be drawn from this clause of the act than that no objection of any kind can or will be

entertained by the court from a party to the case, and this, of course, removes also all discretion or volition of the court on its own motion.

A provision of a statute or a code or an act is said to be *mandatory* when it is the *essence* of the thing required to be done.

Where a statute declares a thing SHALL be done, the natural and proper meaning is that a peremptory mandate is enjoined.

Where authority to proceed in courts is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is *mandatory* and must be strictly conformed to, or otherwise the proceeding will be void.

81 Pa. St., 349, Norwegian Street.

In the above case Justice Woodward states the better rule in the following language, page 354:

"Perhaps Lord Mansfield's rule in Rex *vs.* Locksdale, 1 Burr, 447, is a better one, that whether a statute is mandatory or not depends on whether the thing directed to be done is of the essence of the thing required. Here, in order to confer jurisdiction on the court, the preliminary action of the town council was declared to be essential. There is another principle which is decisive in its application. In all cases in the courts where the authority to proceed is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory, and must be strictly complied with, or the proceeding will be utterly void" (Dwarris on Statutes, Potter's Note, 29, page 222).

In other words, this act of April 3, 1893, has included within the method of trial of certain mining litigation a power and a privilege to either party to the action, which is mandatory upon the court, and such as must be obeyed under penalty of vitiating the whole trial and having the proceedings of such trial declared void.

In section 385 of the Code of Colorado, providing for bill of exceptions on appeal, line 4 of said section contains an exactly parallel mandatory power or privilege granted to a party appealing. The words are:

"It shall be the duty of the judge to allow the same."

In the act of April 3, 1893, the words are:

"It shall be the duty of the court * * * to send * * *."

It will not be contended for a moment that the duty prescribed by section 385 of the Code, requiring the judge to sign the bill of exceptions, is "not mandatory."

The Supreme Court of the United States has decided in *Ex parte* Jordan, 95 U. S, 248, that such terms are mandatory, quoting:

"We think the appeal should have been allowed. The petitioners were defendants in the suit when the final decree was rendered. They were directly interested in what was then decided. The allowance of an appeal under section 692, Revised Statutes, follows of course, if prayed for by one who has a right to it. The language of the statute is '*shall be allowed*,' which means '*must be allowed*' when asked for by one who stands in such relation to the cause that he can demand it."

Out of the 444 sections of the Code of Civil Procedure of Colorado there are but four sections which have in them the words:

"*It shall be the duty of the judge of the court or of such court.*"

The first one of the four is section 92 E, which is section 6 of the amendment to the attachment act, passed March 5, 1894, and in which it is provided: "When the claim * * * shall exceed the sum of two thousand dollars, exclusive of costs, *it shall be the duty of such court* to forthwith certify such case and * * * to the district court."

No pretense can be made that any discretion is left in the county court when the papers show the case beyond its jurisdiction.

Section 188 A, as annotated by Judge Mills, is the act of April 3, 1893, now under discussion, and is the second instance.

Section 367 is the third instance, and reads as follows:

"Upon proof of the service of the notice, as provided in the last section, *it shall be the duty of the judge*, before whom the depositions are taken, to proceed to take the depositions of the witnesses named in said petition upon the facts therein set forth; and the taking of the same may be continued from time to time in the discretion of the judge."

The essence of the above requirement is the taking of the deposition immediately after the notice is complete and is therefore mandatory in every sense of the word and by all definitions of the word "mandatory," because the whole section would be void and nugatory without it.

The last of the four sections in which the term and phrase occurs is section 385, and covers the duty of the judge about signing the bill of exceptions:

"SECTION 385. In all cases in courts of record where either party shall except to any ruling, decision or opinion of the court, and shall reduce such exception or exceptions to writing, *it shall be the duty of the judge to allow the same.*"
* * *

The decision in the case of *Ex parte* Jordan, 94 U. S., 248, says such a phrase as the above means "must" and is mandatory.

In French *vs.* Edwards, 13 Wall., 506–511 (U. S. Sup. Ct.), the court says:

"But when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not

directory but mandatory. They must be followed or the act done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In Fowler *vs.* Pirkins, 77 Ill., 273, the court announces the same rule:

"'The words 'may' or 'shall,' when used in a statute, may be read interchangeably, as will best express the legislative intention. The rule adopted by this court is 'the word may means *must* or *shall*, only in cases where public interests and RIGHTS are concerned, and the public or third persons have a claim *de jure* that the power shall be exercised.' Schuyler Co. *vs.* Mercer Co., 4 Gilm., 20. And so, on the other hand, the word 'shall,' if any RIGHT to any one depends upon giving it an *imperative construction*, the presumption is the word was used in reference to such *right* or *benefit*; but where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely."

Citing Wheeler *vs.* City of Chicago, 24 Ill., 105.
See also Seiple *et al. vs.* Mayor *et al.*, 27 N. J. L., 407.

The legislative intent of the passage of the act of April 3, 1893, was to confer a right, a benefit, a power, a privilege, and an immunity upon the trial of "all cases involving the title to, the right of possession of, or the mineral contained in any mine or mining claims," to both parties to the litigation, and to construe that act as simply discretionary and directory upon the court is to leave the whole matter exactly where the terms of section 188 of the Code left the matter, and it would destroy that other material incident mentioned by Lord Mansfield in imperative and mandatory provisions, "the essence of the act itself."

If, therefore, it was the duty of the trial court to send the jury out to make the view, and the right, privilege, and benefit of appellants under that provision of the Code to have it sent out, it is difficult for us to comprehend how a disregard of that duty and a denial of that right and privi-

lege are discretionary and subject to the whim and caprice of the court and constitute no error. If they be so, it would seem that any other legal duty of the court might be disregarded and any other right of the litigant taken away by the court *ad libitum*, and so no hearing accorded whatever.

No considerations or opinions or beliefs of the court on the question of inconvenience or the effect upon the jury upon the facts of the case should be allowed to deprive appellants of this right given them in a case so made. Indeed, we apprehend that this honorable court will be quick to announce that this is a right given and granted to parties to such actions which cannot be taken away from them save and except by the hand of the legislative power of the State, which granted the right by repealing the statute.

We beg the pardon of the court for not quoting the well-known maxim, ITA LEX SCRIPTA EST, and letting the question go at that.

The profound statement of that principle by the great and eminent Judge Story cannot be too clearly or forcibly impressed upon both the bench and the bar (see Story Conflict of Laws, 17):

"Arguments drawn from impolicy or inconvenience, ought to have little weight. The only sound principle is to declare "*ita lex scripta est*," TO FOLLOW AND OBEY. Nor if a principle so just could be overlooked, could there be well found a more unsafe guide in practice, than mere policy and convenience. Men on such subjects complexionally differ from each other; the same men differ from themselves at different times. The policy of one age may ill suit the wishes or the policy of another. *The law is not to be subject to such fluctuations.*"

We ask the privilege of the court to file with this our brief eight copies of a brief prepared by Judge A. S. Blake in the court of appeals in the case of Patrick K. Connolly *vs.* Thomas B. Hughes *et al.*, which, upon pages 13 to 20, inclusive, discuss at large a similar refusal of the judge of the fifth

judicial district to send the jury to inspect the premises i
mining adverse case.

This refusal of the court bore with peculiar hardship u
appellants in this, that the appellee introduced five witne
to prove some six veins or lodes in place in a drift forty-
feet long. They were John King, Max Boehmer, S.
Mudd, John R. Curley, and Jesse F. McDonald. T
placed these lodes at points four, six, fifteen, nineteen, fo
and forty-five feet from the edge of the shaft. The ap
lants introduced four witnesses to the effect that these
pearances were clay slips, jointures, cleavages, and crack
the porphyry, with no definite course to them, and that th
was no demonstration of the fact that any one of th
was a vein. Charles Slavin, one of the lessees of appel
who ran the drift himself, swore that there was no vein or l
in that drift. The assays presented by Jesse F. McDon
to prove the presence of gold and silver in these preten
veins and lodes were not in the least higher than what
fessor Emmons, the engineer and geologist in charge of
geological survey of Leadville, found to be the average sil
and gold contents of the pyritiferous porphyries of Br
hill, his examinations discarding all material taken fr
the jointure planes of the porphyry and taking extens
precautions to eliminate the presence of all fractions of sil
or gold in the litharge used in the assays, which does
appear to have been done by Mr. Stevens.

We quote page 580, *Geology and Mining Industry*, of Le
ville:

"The average assay of the ten specimens of pyritifer
porphyry is 0.2773 ounce Ag. per ton; but one of th
might be considered abnormal, since it alone contains m
than the sum of the other nine. Rejecting this, the aver
of the other nine specimens is 0.0265 ounce Ag."

Again, page 583:

"From Table IV the average of ten specimens assayed
silver is found to be 0.2773 ounce per ton, or, rejecting

richest of these ten specimens as above the normal, the average of the remaining nine specimens is 0.0265 ounce silver per ton of pyritiferous porphyry."

On page 580 Professor Emmons calls attention to a larger concentration of mineral at the jointure planes of the rock.

"Both pyrite and galena are occasionally found, however, coating the jointing planes of the rock, in which case they are undoubtedly secondary."

We copy from Table IV, page 594:

"23—Pyr. por., shaft W. of Tribune, Breece hill, 2.533 Ag. No Au.

"24—Pyr. por., Hartford shaft, Breece hill, 0.08 Ag. Trace Au.

"25—Pyr. por., Montana shaft, Breece hill, 0.013 Ag. Trace Au.

"28—Pyr. por., So. Fork, White's gulch, 0.033 Ag.

"29—Pyr. por., Comstock tunnel, White's gulch, 0.033 Ag.

"34—Pyr. por., Rebel Warrior shaft, Bail Mt., 0.023 Ag."

The assays presented by appellees from their veins were as follows:

No. 1—Vein No. 4, no Ag.; 0.13 Au.

No. 2—Vein No. 4, 0.04 Ag.; 0.11 Au.

No. 3—Vein No. 3, trace Ag.; 0.09 Au.

No. 4—Vein No. 2, 0.5 Ag.; 0.02 Au.

No. 5—Vein No. 1, 0.5 Ag.; 0.01 Au.

Another assay introduced by them, but not proved as connected with a vein or lode, was 7 oz. Ag.; .03 oz. Au.

The latter assay and the best one presented by appellees was sworn to as coming from that drift at six feet from the shaft. It was permitted to go to the jury over the objection of appellants, with the understanding that, as stated by the court, page 135, Abstract:

"The COURT: The understanding is you are going to connect this with the lode.

"Mr. EWING: Certainly.

"The COURT: With the understanding that it is to be connected with a lode in rock in place it will be admitted.

"To which ruling of the court the plaintiffs duly excepted."

No witness was even interrogated as to a vein at a point six feet from the shaft, and, on the contrary, Boehmer, Mudd, Curley, and McDonald, the witnesses of appellee, all swore there was none there.

We are speaking of this last assay only to enlighten the court that an assay of the bare porphyry in that drift actually did run higher than their jointure plane and cleavage material.

Taking this apparent contradiction and the further glaring contradictions on the size of these cleavages, some of appellee's witnesses swearing to four inches in size when none of appellants' witnesses could find these cleavages greater than or even equal to one-half inch in thickness; the further fact that Charles Slavin, one of appellee's lessees in the work, testifying that the whole drift was nothing but porphyry and there were no vein there at all, and he was the only miner on the stand who drove through that porphyry.

We submit to the court that the refusal to send the jury to view that drift was an invasion of appellants' privilege and right under the act of April 3, 1893, and for this error alone this case should be reversed.

The next assignments of error are Nos. eleven and four teen and are as follows:

"11. The court erred in refusing to allow plaintiffs to cross-examine Charles Slavin, defendant's witness and lessee, upon the work done by him in the southeast drift of the Pocket Liner shaft and what he found in said drift, although directly interrogated by defendants as to work in that drift in their direct examination, and requiring plaintiffs to make the said Slavin their own witness and compelling plaintiffs to count the said Slavin as one of their four rebutting wit-

nesses of plaintiff as to the southeast drift, all over the exception and objection of plaintiffs.

"14. The court erred in limiting the number of witnesses of plaintiffs in rebuttal to four, over plaintiffs' exception and objection, and by refusing to permit proper cross-examination of defendant's witness, Charles Slavin, further confining and limiting plaintiffs' witnesses in rebuttal to four."

The significance of this ruling can be judged in all its beauty when we make the statement that the court permitted John King, Max Boehmer, John R. Curley, S. W. Mudd, Jesse F. McDonald, and Charles Slavin, all witnesses for appellee, to testify as to that drift and shaft, and then limited appellants to Messrs. Slavin, Goodwell, Guntherodt, and P. B. Turnbull as rebuttal witnesses, although his rule, page 17, Abstract, was as follows:

"Order of court that witnesses to any material fact be limited to four. Excepted to by plaintiffs."

The true rule for the limitation of witnesses is an agreement of counsel evidenced by an order of court, and then only after reference of the matter to both sides.

Page 243, Abstract:

"Malcom G. Alexander called as a witness for the plaintiffs in rebuttal.

"The COURT: You have already put upon the stand four witnesses to rebut the existence of any vein within what has been referred to as the east drift and marked upon the map as running southeasterly from the shaft.

"Mr. ELDER: We except to the ruling of the court confining us to the evidence of the four witnesses already sworn upon the existence of a vein in the east drift."

We now refer to the whole testimony of Charles Slavin, from page 195 to page 206.

The only limitation upon the number of witnesses in the statutes is contained in section 685, page 710, vol. 1, Mills' Ann. Sts., and this is confined alone to the question of fees.

In White *vs.* Herman, 51 Ill., 243, the supreme court of Illinois has passed upon this very point, as follows:

"It is also urged that the court erred in refusing to permit appellants to call more than four witnesses to prove the value of this property. It may be that on a mere collateral question, the court may have a discretionary power to limit the number of witnesses who may testify on that particular question. We are aware of no rule of practice, however, which authorizes a court to prevent a party from introducing more than four witnesses to prove the issue in the case. It is true the statute has provided that the costs of four witnesses only shall be taxed against the unsuccessful party, unless the court shall certify that a greater number were necessary, but this in nowise prevents a party from introducing more if he is willing to risk the liability to pay their fees for attendance. It seems to imply that he may call more if he choose to risk such liability."

We should state, in passing, that our Colorado statute, section 685, vol. 1, Mills, page 710, is identical with R. St. of Illinois, 1845, chap. 26, sec. 12.

Again, in 122 Ill., 598, the supreme court says, citing White *vs.* Herman, *supra:*

"There is no inhibition upon parties calling as many witnesses as they may desire, but every party must assume the risk of having taxed against him the fees of all such witnesses as the court may find were unnecessary."

Some of the reasoning of the court in the same opinion is clear and to the point.

"Before a single witness of appellee had been or could have been heard appellant made this motion. How the court in advance could exercise its discretionary power of determining what witnesses were or were not necessary to the maintenance of appellee's case is not apparent."

We know of no statute of Colorado and we know of no rule of law giving the court the authority or the power to arbitrarily and upon his own motion to limit the number of

witnesses which may be introduced in support of any issue, nor do the courts possess the authority to adopt such a rule.

This order, as made by the trial court, is another case where, like Murat's ancestor, it was necessary to create a spurious and illegitimate legal precedent.

We therefore submit to the court that the limiting of the number of witnesses who should testify on each side was error for which the judgment should be reversed.

The refusal of the court to permit appellants to cross-examine appellee's witness, Charles Slavin—one of their lessees and the man who ran this discovery drift—was such a palpable error that we just mention it as we pass.

Assignment of error No. ten was as follows:

"The court erred in permitting the evidence of John King and Eugene Stevens, relating to material taken from a point in the southeast level six feet (6) from the shaft at the one hundred and thirty-five (135) foot level of the Pocket Liner shaft, and the assay value thereof to go to the jury, without making proof that said material came from a vein, lode or ledge of mineral; and the error is manifest in this, that all of the other witnesses of the defendant disprove the existence of any vein at all six (6) feet from said shaft at the point indicated by witness John King."

This error was material, and assignment of error No. twenty-six, being to the giving of instruction No. four, based upon it, asked by defendant below, where the date of the assay card admitted in evidence March 10, 1894, is made the basis of their discovery.

No. 26. The court erred in giving instruction No. four to the jury, as asked by defendant, against the exception of plaintiffs, as follows:

"You are further instructed that if you find that on or about the 10th day of March, A. D. 1894, or prior thereto, the defendant or its grantors, or the lessees of its grantors, did discover a vein or lode of mineral in rock in place within the boundaries of the Golden Rod Lode mining claim,

and that the defendant or its grantors complied with the requirements of the laws as to staking said Golden Rod Lode claim, and recorded a location certificate within the time required by law, then you will find for the defendant."

The evidence of John King is upon pages 127 to 134, Abstract. At no place in his direct or cross-examination does he state that the material he took from the drift and had assayed March 10, 1894, came from a vein or lode. Page 129 he states, on direct examination:

"Eugene Stevens gave me this card, marked Exhibit 'C.' Yes, sir; this is the card given to me as the assay of the material taken from this drift, because I went and seen his books. That was taken about six feet from the shaft. Yes, sir; about six feet from the shaft."

On cross-examination, page 132:

"Q. What was the character of the material? A. A bunch of mineralized stuff, iron and porphyry.

"Q. What was it, kind of red porphyry? A. Kind of red porphyry mixed with oxide of iron."

Page 135, Abstract:

"Exhibit 'C' offered in evidence. Plaintiffs object to the introduction of Exhibit 'C' of defendant, bearing date March 10, 1894, purporting to be an assay card.

"1. For the reason that it is not established that the material came from the lode, ledge or vein of mineral in rock in place in the discovery shaft of the Golden Rod Lode mining claim.

"2. Plaintiff objects to Exhibit 'C' for the reason that it is not shown that the material of which this is supposed to be an assay came from a lode, ledge or vein of mineral of rock in place in the limits of the Golden Rod Lode mining claim.

"3. For all the objections made to the original lease and the record of location.

"The COURT: *The understanding is you are going to connect this with the lode.*

"Mr. EWING: Certainly.

"The COURT: *With the understanding that it is to be connected with a lode in rock in place it will be admitted.*

"To which ruling of the court the plaintiffs duly excepted."

Page 136, Abstract:

"Copy.

"DEFENDANTS' EXHIBIT 'C.'

"Office of Eugene Stevens, assayer and chemist, 110 East Fourth St.

"LEADVILLE, COLO., *March* 10, 1894.

"This certifies that the sample of ore, said to be from the —— lode, assayed for Mr. King, gave the following result per ton:

"Silver, ounces, 7; gold, ounces, .03.

"EUGENE STEVENS, *Assayer.*

"Whipple, printer."

On page 136, the photograph of map made by Max Boehmer, are displayed all the veins Mr. Boehmer could find. On page 137 he says he found a vein four feet from the shaft about two or three inches thick. John R. Curley, page 160, states that vein was "a short distance from the shaft, perhaps two or three feet," "probably an inch and a half to two inches and a half wide."

S. W. Mudd, page 169:

"About four feet from the shaft there was a vein crossing the drift at right angles and dipping to the southwest."

Page 175:

"Q. Mr. Mudd, what is the size of vein number one? A. From an inch to an inch and a half, possibly a little larger."

Page 169:

"In addition to those there was a small one running across some distance back perhaps some fifteen or sixteen feet from

the shaft, much smaller than the others, but much the same character, however.

"Q. How large? A. The maximum would be, I should think, from a quarter to half an inch in width."

J. F. McDonald, page 182:

"At a point four feet from the side of the shaft is a vein cutting across at nearly right angles, from one to two inches thick."

There was no testimony as to what existed at any point from a point four feet from the shaft to a point fifteen or sixteen feet from the shaft. Now, skilled experts like Mr. Mudd and Mr. Boehmer, who can find veins as small as from one-fourth of an inch to one-half of an inch in size, in blank porphyry, are not going to miss a vein at six feet from the shaft which seemed to assay fourteen or fifteen up to thirty and forty times what they could find in the immense veins they testified to.

To cut it short, the admission of that assay card was material error, and undoubtedly influenced the jury, and the instruction based on the date of the card—No. 4, March 10, 1894—should not have been given to the jury. This evidence ought to have acted as a boomerang to the defendant's case. If it proves anything, it proves that the red porphyry in that drift has more gold and silver contents than the small cleavages, jointure planes and slips and seams in the porphyry which the defendant's experts searched and researched, assayed and reassayed, sampled and resampled, and then could get but a trifle better returns than Professor Emmons secured from the raw pyritiferous porphyries, and in his report he takes pains to state that his samples did not come from the jointure planes and cleavage planes of the porphyries. If the court will study the cross-examination of Messrs. Boehmer and Mudd, they will discover that the drift is cracked and broken from end to end,

with slips and cleavage planes, and that when boiled down it is only a blind porphyry drift from end to end.

The conduct of the court in refusing plaintiffs to base their discovery and location upon what defendant's witness Charles Slavin denominated the only vein in the Pocket Liner shaft—and he knew because he sunk the shaft and ran the drift and was hunting at both periods, in 1879 and 1880 and in 1894, for that very thing, a vein, lode, and ledge of mineral in place; the only vein Samuel McMillen knew to be in the ground opened and exposed upon May 30,1893—cannot be explained.

His refusal to allow the proof of a vein in the southeast fraction of the Eulalia lode, where tons and tons of gold and silver bearing mineral of commercial value were taken from the vein between the porphyry and the quartz at the 380-foot level of the Little Vinnie workings, where appellants expended over two thousand ($2,000) dollars in proving a lode and vein in the limits of the Eulalia location, is equally inexplicable.

His insistence that his power to issue writs of restitution could once and forever segregate a part of the Eulalia claim from entry by its owners, no matter how peaceful, and that these owners could not be allowed to drive a drift on their vein, or even do assessment therein, and still insisting that appellants could prove no vein so encountered in the years 1895, 1898, and 1899, are all but further evidence of a powerful bias for the side of appellee in this case.

And, finally, to take away all of appellants' rights by instructing the jury that appellants had made no case, and then refusing the prayer of appellants to have the jury examine the east drift from the Pocket Liner shaft, shows such utter contempt for the orderly practice of the law that no man's property rights are safe in this court.

We have before stated that the courts and the juries of this western country have been quick to establish and confirm that old, staid maxim of the law, "*Qui prior est tempore,*

potior est jure," and we can assure this court when they reverse this case, as they must do when they contemplate the multitudinous errors committed by the court, that the next trial will vindicate the rights of the prior locator as against these jumpers.

Therefore, for the exclusion of proper evidence, for the admission of improper evidence, for the violations of the plain rules and provisions of the Code, for the refusal of proper and competent instructions and the giving of instructions not sustained by the evidence, and because the grantors of appellee were trespassers upon the ground already occupied by appellants and had full and complete notice of appellants' claim of title when they made their entry, we submit that this judgment should be reversed and the case remanded.

Respectfully submitted,

GEORGE R. ELDER,
Attorney for Appellants.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 185.

SAMUEL McMILLEN, RONALD MORRISON, AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15199

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Answering the brief of counsel for defendant in error, we desire to discuss some matters not touched upon in our opening brief.

On pages 7 and 8 of its brief defendant in error contends:

First. That the decision of the supreme court of Colorado is not reviewable by this court:

(*a.*) Because there was no ruling in the cause adverse to or in contravention of any express right, title, privilege, or immunity of plaintiffs in error under section 2320 of the Revised Statutes of the United States or any denial of or against any title, right, privilege, or immunity claimed by

plaintiffs in error under the statutes or laws of the United States.

(*b.*) Because any claim made by plaintiffs in error that the statute of the State of Colorado which requires the posting of a notice at the point of discovery is invalid, inconsistent with, repugnant to, and in contravention of section 2320 of the United States Statutes was not raised at the trial in the State court nor in the appeal to the supreme court of Colorado, and was raised, if at all, for the first time in the petition for a rehearing to the supreme court of Colorado.

Plaintiffs in error contend that it is and was their express right, title, privilege, and immunity under that part of section 2320 of the Revised Statutes of the United States which reads—

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located"—

to prove the presence of and their knowledge of its presence, and that one of plaintiffs in error, Samuel McMillen, as an owner in the original Pocket Liner Lode location, actually discovered in 1879 and 1880 a vein or lode of gold and silver ore in the Pocket Liner shaft at a depth of 90 to 120 feet in said shaft, and that this right, title, privilege, and immunity under section 2320 of the Revised Statutes was denied them by the ruling of the supreme court of Colorado in the following portion of their opinion (see R., fols. 373 and 374, p. 228):

"2. There is another reason for holding that plaintiffs may not avail themselves of that rule. It appears that they not only do not question the validity of our State statutes which prescribe certain acts as necessary to a valid location, but in their complaint they aver that in the location of the Eulalia lode the provisions of the State, as well as of the

Federal, statutes were complied with; and among the instructions which they themselves asked the court to give was one—applicable both to their own and the Golden Rod location—in which was the declaration that, as provided by section 2152, Mills' Annotated Statutes, a valid location of a lode mining claim cannot be made unless the locator sinks a discovery shaft upon the lode discovered to a depth of at least 10 feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice, and unless he posts at the point of discovery on the surface a location stake containing certain designated things. Such being true, plaintiffs certainly cannot now be heard to say that they may at their will disregard these mandatory provisions of State legislation, which they themselves have invoked, for, if we assume their validity (which plaintiffs themselves do not question, and which they declare they have complied with), *the discovery shaft must expose the vein upon which the location of the Eulalia lode was based, or at least one vein;* **and a discovery elsewhere within the limits of the claim will not supply its place.** Beals *v.* Cone, 27 Colo., 473, 499; 62 Pac., 948; 83 Am. St. Rep., 92. Lindley on Mines, at section 250 (15), says that State courts have uniformly enforced provisions like those of ours concerning discovery shafts and posting of notices, notwithstanding doubts by the Interior Department, as to their validity. See, also, Van Zandt *v.* Argentine M. Co., 8 Fed., 725; 2 McCrary, 159; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S., 478; 7 Sup. Ct., 1356; 30 L. Ed., 1140, and Morrison's Mining Rights (9th ed.), 29. But as already shown, plaintiffs are not questioning their binding force and are not in a position to do so."

That this ruling was based on the first six assignments of error filed by plaintiffs in error in the trial court to the judgment and rulings of the district court of the fifth judicial district of the State of Colorado, which were as follows (see R., fols. 352–354, pp. 216 and 217):

"1. That the court erred in refusing to allow plaintiffs to prove by Thomas H. Thompson, the discovery and existence of a vein of gold and silver bearing ore in rock in place in

the Pocket Liner shaft within the limits of the Eulalia Lode mining claim prior to the location, staking and survey of the Eulalia Lode claim, and that Samuel McMillen one of the appellants, and plaintiffs below was one of the owners of the Pocket Liner Lode claim at the time of such discovery and disclosure of said vein; and knew and claimed at the time of the location and staking of the Eulalia Lode claim of the discovery and existence of a vein of gold and silver bearing ore in the Pocket Liner shaft within the limits of his location—the Eulalia Lode mining claim.

"2. That the court erred in refusing to allow plaintiffs to prove by witnesses M. M. McInnis and W. L. G. Smith the discovery and existence of a vein and body of gold and silver bearing ore opened by them; and from which vein and lode quantities of such ore were mined, shipped and sold by them to the Union Smelting Company; such work being done by the plaintiffs in this action through the workings of the Little Vinnie Lode claim from the three hundred eighty (380) foot level of the Little Vinnie shaft and while said property was under lease to some of these appellants.

"3. The court erred in refusing to admit in evidence in behalf of plaintiffs, smelter settlements, books of original entry of the Union Smelting Company, original receipts, checks, check stubs, control assays, bank deposit books, bank balance books and daily bank deposit books, checks and receipted bills of ore samplers, and scale weight bills—as documentary evidence of ore shipments and actual proof of the men in charge of the work of taking the ore from the vein within the southeast fraction of the Eulalia lode, and shipping the same to the smelter.

"4. The court erred in refusing to allow plaintiffs to prove what they discovered, opened and disclosed by their work done in the southeast Eulalia fraction from the three hundred eighty (380) foot level of the Little Vinnie claim, and which was shown in the stopes above their drift driven into their Eulalia claim.

"5. The court erred in holding that the United States statutes and the statutes of Colorado required plaintiffs to show an opening or openings within the lines of their Eulalia claim from any vein, lode or ledge discovered by them within the limits of their Eulalia claim to the surface of the earth; before plaintiffs could claim and prove a discovery

of such vein, lode or ledge from by or through workings having their only openings on territory outside the limits of their Eulalia Lode claim.

"6. That the court erred in holding that plaintiffs were prohibited by the injunction issued in the case of The Ferrum Mining Company *vs.* Samuel McMillen, Ronald Morrison and John McCombe a proceeding under section 159 of the Code of Colorado, from working in and upon the Pocket Liner shaft, and introducing evidence as to the vein discovered and disclosed in the north drift from said shaft while performing their annual assessment work for the years 1895, 1898 and 1899, the said premises being within the lines of their Eulalia Lode mining claim and a part and portion of the ground in controversy in this action, and being in the peaceful possession of the plaintiffs herein."

This ruling also came up upon the refused instructions of plaintiffs in error, assigned as errors, being No. 2, No. 4, and No. 5, assigned as errors, which were as follows (see R., fols. 36, 38, and 39, pp. 21 and 22):

"INSTRUCTION No. 2.

"The court further instructs the jury that although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one.

"GEORGE R. ELDER,
"*Attorney for Plaintiffs.*

"Refused.

"FRANK W. OWERS, *Judge.*

"Excepted to.

"GEORGE R. ELDER,
"*Att'y for Pl'ffs.*"

"INSTRUCTION No. 4.

"The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made of the existence of mineral.

"And under section 2320 Revised Statutes of the United States the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location even though the discovery was first made by some one other than the locator.

"GEORGE R. ELDER,
"*Attorney for Plaintiffs.*

"Refused.

"FRANK W. OWERS, *Judge.*

"Excepted to.

"GEORGE R. ELDER,
"*Att'y for Pl'ffs.*"

INSTRUCTION No. 5.

"The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location.

"It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein, or lode within the limits of his location but it must be known to him and claimed by him, in order to give validity to the location.

"GEORGE R. ELDER,
"*Attorney for Plaintiffs.*

"Refused.

"FRANK W. OWERS, *Judge.*

"Excepted to.

"GEORGE R. ELDER,
"*Att'y for Pl'ffs.*"

In Gross *vs.* United States Mortgage Co., 108 U. S., 477–484 this honorable court has decided that it is the duty of the court to examine the opinion of the supreme court in considering whether the case can be reviewed upon writ of error.

In that case Justice Harlan announces the rule in the following language:

"We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the supreme court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the State court adversely to a right, title or immunity under the Constitution or laws of the United States, and specially set up and claimed by the party bringing the writ. Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois, which requires, not only that the justices of the supreme court of the State shall deliver and file written opinions in cases submitted to it but, that, 'such opinions shall also be spread at large upon the records of the court.'"

It was also so held by this court in—

Gibson *vs.* Choteau, 8 Wall., 314.
Parmalee *vs.* Lawrence, 11 Wall., 36.
United States *vs.* Taylor, 147 U. S., 695–700.

That these questions were squarely presented to the trial court may be seen from the rulings upon the evidence of Thomas H. Thompson, one of the locators of the Pocket Liner lode (R., fols. 169 and 170, pp. 101 and 102):

"Q. Will you go on and state who did the location work of the Pocket Liner claim?

"Objected to by defendant as incompetent, immaterial and not tending to establish any issue in this case.

"The COURT: State the purpose.

"Mr. ELDER: The details of locating the claim.

"The COURT: Is that the only claim interested?

"Mr. ELDER: That is the original claim within the lines of which this discovery was made.

"The COURT: I sustain the objection unless Mr. Elder has a further and better reason. I don't see the materiality of any evidence with regard to the Pocket Liner claim; that is not in issue in this case. If you can show me the materiality of it I shall be glad to have you do so.

"A. I was at that time familiar with the lines of the Glengary Lode claim. I had a half interest in the Glengary claim and located the Pocket Liner at the side line of the Glengary at the north side line.

"Q. Will you state what you found in that shaft in the year 1879?

"Objected to by defendant as incompetent, immaterial and not tending to prove any issue in the case.

"The COURT: Let us hear from you, Mr. Elder, why you want to show what was in that shaft.

"The jury were thereupon excused for thirty minutes.

"Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with his co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final, and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc., etc.

"The COURT: I cannot agree with you. Our statute is clear as to what is required, and it has become almost elementary. You must go either upon the vein and make your discovery or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted."

So, also, the map and evidence of W. L. G. Smith, surveyor, and M. N. McInnis, miner:

EVIDENCE OF W. L. G. SMITH.

"Q. Will you state if you have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode? A. I did.

"Q. Have you such a map? A. Yes.

"Q. Is this the map, sir?

"Mr. CAVENDER: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"Mr. ELDER: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalia lode from the underground workings of the Little Vinnie lode.

"Second. We offer that in case of the working of the Eulalia lode and the shipping of ore or the discovery of mineral in either the drift, or the stopes above the drift during the period of the year 1894; that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of this claim upon the ground, and in support of that proposition I desire to call the court's attention to a case within the last year, heard in your honor's court, in which a discovery was made underground from the Price shaft, and in which I believe Mr. Estey was interested, and which discovery was made underground from a shaft formerly upon the conflicting location.

"The COURT: Connected to the surface through their ground in that case, if I remember.

"Mr. ELDER: So there is a connection through the Little Vinnie shaft.

"The COURT: But not through Eulalia ground. You

should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work and you should offer it next to prove a discovery.

"Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

"The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it is intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

"Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"The COURT: I hold most emphatically this, *that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.*

"Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"The COURT: There was nothing, as far as I see the evidence now. I may be mistaken. This particular part which you point out which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist, 300 or 400 feet under ground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery to constitute a discovery.

"Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property.

"The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift for the

purpose of establishing a discovery on the Eulalia ground unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

"Mr. ELDER: I would like the court to pass on the assessment work.

"Mr. EWING: We will concede they did $100 worth of work within the boundaries of the claim in the year 1894.

"The COURT: Then you don't need any offer on that point.

"Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery, from the underground workings of the Little Vinnie claim.

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court, plaintiffs, by their counsel, then and there duly excepted."

R., fols. 153, 155, 156, 157, 158, pp. 92, 93, 94.

"M. N. McInnis, witness for plaintiff, pp. 58 and 59, Abstract—Miner; have mined upon Breece hill; mined on the Little Vinnie in December, 1894; am familiar with the underground workings of the Little Vinnie, yes, sir, part of it; and familiar with what is known as the 380-foot level of the Little Vinnie.

"Q. Do you know of any work having been done from that level towards the Eulalia Lode claim in the fall? A. We have an upraise; we have a stope there in that level.

"Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

"Objected to by defendant.

"The COURT: What is the purpose of it?

"Mr. ELDER: We are going to prove we shipped ore from that ground.

"The COURT: They will perhaps admit that you did.

"Mr. EWING: No, we will not admit that; but this comes under the same objection.

"And the court sustained such objection.

"The court has already decided that such a drift does not constitute a discovery.

"To which ruling of the court, plaintiffs, by their counsel, duly excepted."

R., fol. 160, p. 95.

These offers of evidence with argument of counsel clearly called to the attention of the court the contention that under section 2320, United States Revised Statutes, and section 3154, Mills' Annotated Statutes of Colorado (designated by us as the equivalent statute for discovery shaft), we were entitled to make this proof and were denied it by the court, whose ruling was based solely and alone upon the inhibitory and inconsistent construction of sections 3150 and 3152, Mills' Annotated Statutes of Colorado, and of which we complain.

This comes squarely under the rule announced by Chief Justice Fuller in Sayward *vs.* Denny, 158 U. S., 180:

"(6.) The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. Hoyt *v.* Thompson, 1 Black, 518; Maxwell *v.* Newbold, 18 How., 515. (7.) Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision. Powell *v.* Brunswick Co., 150 U. S., 433, 439."

The case of Meyer *vs.* Richmond, 172 U. S., 82, cited by defendant in error, is not at all analogous to the case in hand. The United States Government does not own the streets of the city of Richmond, as it certainly still does own the ground in controversy in this suit. The claim of right in the Meyer case was under the fourteenth amendment to the United States Constitution, while the case at bar is under the direct grant of Congress and section 2320, United States Revised Statutes, prescribing its limitations and privileges to the locator and prospector.

Again, in Citizens' Savings Bank *vs.* Owensboro, 173 U. S., 636, cited by counsel, the question was simply and solely a local statute of taxation.

The case of Bushnell *vs.* Cooke Mining and Smelting Co., 148 U. S., 682, cited by counsel, was determined below on a question of the course of the vein.

Two of the cases cited by defendant in error upon the question of jurisdiction have an even narrower claim for review. They are—

Blackburn *vs.* Portland Gold Min. Co., 175 U. S., 571.
Shoshone Min. Co. *vs.* Rutter, 177 U. S., 505.

In these cases plaintiffs in error sought to pursue their writs exclusively under the claim that they were ejectment adverse suits over Government land, brought in support of adverses filed in the United States land office, and they relied upon that ground simply and solely. There was no claim of a conflict of construction between two sections of the statutes of Colorado and section 2320 of the United States Revised Statutes and the grants of Congress to discoverers of lode claims.

We leave this matter as we stated in our opening brief, "that as we understand the law" the facts of each case are the final test of its review.

Second. We make no question that the provisions for survey, staking, depth, and dimensions of shaft, and length of cuts on the vein are distinctly committed to the State legislatures, but we do take issue with counsel in a case like the one at "bar" where it appears from the record that both claimants have failed to place a discovery notice at the point of discovery of the vein on the surface; that it is worse than a work of supererogation to discuss, as counsel does in the third paragraph on page 17, whether the Colorado statute on discovery notices is mandatory or not. If it is mandatory and defendants in error have failed

to obey it there is a fatal error in their case, and the supreme court of Colorado should have reversed their judgment for that reason alone.

The testimony of Mr. Jaycox, civil engineer (R., fols. 286, 287, 288, and 289, pp. 177, 178, and 179), was all that was given of the staking and survey of the Golden Rod lode for their second amended location certificate recorded March 8, 1895 (see R., fols. 293–295, pp. 181, 182, and 183), and there was no evidence introduced of posting a discovery notice or discovery stake at the Pocket Liner shaft by defendant in error.

On the other hand, if, as we claim, that notice cannot be so stringently construed, the rulings of the trial court and the supreme court of Colorado should be reversed and plaintiffs in error be allowed to try this case without being hampered with these narrow constructions and reasonings based on the grants of the United States statutes.

Counsel state, page 17 of their brief:

"The State statute requires the sinking of the discovery shaft on the lode, not at some other point within the boundaries of the claim."

What counsel means is that sections 3150 and 3152, Mills' Annotated Statutes of Colorado, attempt to do that and we are unwilling sufferers to prove the everlasting truth of the fact that the trial court and the supreme court of Colorado agreed with him.

But our contention is that section 3154, Mills' Annotated Statutes of Colorado, which we have called the "equivalent statute," and which is in words as follows:

"3154. Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft,"

can by no such construction be cut out of the act of February 13, 1874, since its logical legal intendment is in furtherance

of a more liberal construction and application of section 2320 of the Revised Statutes of the United States.

Further on, counsel says, bottom of page 17 and top of page 18 of brief:

"This question has been fully considered under a similar State statute by the supreme court of Utah in the case of Copper Globe Mining Company *vs.* Allman, 23 Utah, 410, and also by the United States circuit court of appeals of the ninth circuit, in the case of Nevada Sierra Oil Company *vs.* Home Oil Company, 98 Fed., 674, in which Judge Ross uses the following language:

"'It is also true as a matter of law that it is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discoveries, but such actual discovery must be adopted and claimed by him in order to give validity to his location.'"

If it had been permitted to plaintiffs in error to have discovered, in the decisions of the mining States, the Federal courts, and the National Supreme Court, any such construction as claimed by defendant in error of sections 3150, 3152, Mills' Annotated Statutes of Colorado, as established and determined when construed with the "equivalent statute," section 3154, Mills' Annotated Statutes of Colorado, and section 2320, Revised Statutes of the United States, we would not now be asking the time of the Supreme Court of the United States to differentiate between the clauses and terms of these sections.

As the case Kendall *vs.* San Juan Silver Mining Co., 144 U. S., 658, is cited in support of counsel's theory, we must remind him that claimant filed no location certificate whatever on his claim after the opening of the reservation, and that the court properly held that a prior filing would not aid claimant, so that there is no analogy between that case and the case at bar.

Third. On pages 6 and 7, plaintiffs attempt to support the erroneous ruling of the trial court giving the instruction No. — for defendant in error (R., fol. 31, p. 17):

"INSTRUCTION No. —.

"You are further instructed that if you find that, on or about the 10th day of March, A. D. 1894, or prior thereto, the defendant or its grantors, or the lessees of its grantors, did discover a vein or lode of mineral in rock in place, within the boundaries of the Golden Rod Lode mining claim, and that the defendant or its grantors complied with the requirements of the laws as to staking said Golden Rod Lode claim and recorded a location certificate within the time required by law, then you will find for the defendant.

"CHAS. CAVENDER,
"JOHN A. EWING,
"*Attorneys for Defendant.*"

"Given.

"FRANK W. OWERS, *Judge.*"

"Excepted to.

"GEORGE R. ELDER,
"*Att'y for Pl'ffs.*"

Which, with the admitted testimony of John King (R., fols. 212–219, pp. 128 to 135) and the admitted testimony of Eugene Stevens as to the following assay card, Defendant's Exhibit C (see R., fols. 221 and 222, p. 134; 215, p. 130), as follows:

"COPY DEFENDANT'S EXHIBIT 'C.'

"Office of Eugene Stevens, assayer, 110 East Fourth St.

"LEADVILLE, COLO., *Mar.* 10, 1894.

"This certifies, that the sample of ore, said to be from the —— lode, assayed for Mr. King gave the following result per ton:

No.	Marks.	Silver ounces.	Gold ounces.	Lead per ct.	Iron per ct.	Mang. per ct.	Silica per ct.	Copper per ct.	Zinc per ct.
1	.....	7	03-100	.....	.....	.....	.....	.....	.....
2	.....	.....	.....	.....	.....	.....	.....	.....	.....
3	.....	.....	.....	.....	.....	.....	.....	.....	.....
4	.....	.....	.....	.....	.....	.....	.....	.....	.....
5	.....	.....	.....	.....	.....	.....	.....	.....	.....
6	.....	.....	.....	.....	.....	.....	.....	.....	.....
7	.....	.....	.....	.....	.....	.....	.....	.....	.....

"Limberg Golden Rod.

"EUGENE STEVENS, *Assayer.*

"Whipple, printer.
"Copy Def't's Ex. C."

"Eugene Stevens, being called as a witness for the defendant and duly sworn, testified as follows:

"Direct examination by Mr. EWING:

"Q. You are an assayer, are you? A. Yes, sir.

"Q. Were you such in 1894? A. Yes, sir.

"Q. Doing business where? A. On Fourth street.

"Q. In Leadville, Colorado? A. Yes, sir.

"Q. Do you know Mr. King, the gentleman who has just left the stand? A. Yes, sir.

"Q. I will ask you if he brought you any material in the year 1894 on or about the 10th of March for assaying? A. Yes, sir.

"Q. I will ask you if you assayed it? A. I did.

"Q. I will ask you if you gave him a card showing what that assay was? A. Yes, sir.

"Q. I will ask you to look at Exhibit 'C' and state to the court and jury whether or not that was what you gave him? A. Yes, sir; that is my writing.

"Q. Does that correctly represent the contents of the material which was assayed by you and brought by him to you for assay? A. Yes, sir; it does.

"Exhibit 'C' offered in evidence by defendant. Plaintiffs object to the introduction of Exhibit 'C' of defendant bearing date March 10th, 1894 purporting to be an assay card, for the reason that it is not established that the material came from the lode, ledge or vein of mineral in rock in place in the discovery shaft of the Golden Rod Lode mining claim.

"2. Plaintiffs object to Exhibit 'C' for the reason that it is not shown that the material of which this is supposed to be an assay came from a lode, ledge or vein of mineral of rock in place in the limits of the Golden Rod Lode mining claim.

"3. For all of the objections made to the original lease and the record of location.

"The COURT: The understanding is that you are going to connect this with the lode?

"Mr. EWING: Certainly.

"The COURT: *With the understanding that it is to be connected with a lode in rock in place it will be admitted.* To which ruling of the court plaintiffs duly excepted."

was admitted upon the distinct understanding that it was to be connected with a lode in rock in place, and the court can search the testimony in vain to find any one swearing to a vein six feet from the shaft, the point where John King said he got the material. (See R., fol. 216, p. 130.)

"Q. I will ask you to state whether or not that is the card given to you as the assay of the material taken from this drift? A. Yes, sir; that is the card, because I went and seen his books.

"Q. Whereabouts in the drift was that taken? A. About six feet from the shaft.

"Q. About six feet from the shaft? A. Yes, sir."

No witness was even interrogated as to a vein at a point six feet from the shaft, and, on the contrary, Boehmer, Mudd, Curley, and McDonald, the witnesses of appellee, all swore there was none there.

We are speaking of this last assay only to enlighten the court that an assay of the bare porphyry in that drift act-

ually did run higher than their jointure plane and cleavage material.

Taking this apparent contradiction and the further glaring contradictions on the size of these cleavages, some of appellee's witnesses swearing to four inches in size when none of appellants' witnesses could find these cleavages greater than or even equal to one-half inch in thickness; the further fact that Charles Slavin, one of appellee's lessees in the work, testifying that the whole drift was nothing but porphyry and there were no veins there at all, and he was the only miner on the stand who drove through that porphyry, we do not understand the reasons for the supreme court of Colorado sustaining the judgment below.

This ruling of the court bore with peculiar hardship upon appellants in this, that the appellee introduced five witnesses to prove some six veins or lodes in place in a drift forty-five feet long. They were John King, Max Boehmer, S. W. Mudd, John R. Curley, and Jesse F. McDonald. They placed these lodes at points four, six, fifteen, nineteen, forty, and forty-five feet from the edge of the shaft. The appellants introduced four witnesses to the effect that these appearances were clay slips, jointures, cleavages, and cracks in the porphyry, with no definite course to them, and that there was no demonstration of the fact that any one of them was a vein. Charles Slavin, one of the lessees of appellee, who ran the drift himself, swore that there was no vein or lode in that drift. The assays presented by Jesse F. McDonald to prove the presence of gold and silver in these pretended veins and lodes were not in the least higher than what Professor Emmons, the engineer and geologist in charge of the geological survey of Leadville, found to be the average silver and gold contents of the pyritiferous porphyries of Breece hill, his examinations discarding all material taken from the jointure planes of the porphyry and taking extensive precautions to eliminate the presence of all fractions of silver

or gold in the litharge used in the assays, which does not appear to have been done by Mr. Stevens.

We quote page 580, *Geology and Mining Industry*, of Leadville:

"The average assay of the ten specimens of pyritiferous porphyry is 0.2773 ounce Ag. per ton; but one of these might be considered abnormal, since it alone contains more than the sum of the other nine. Rejecting this, the average of the other nine specimens is 0.0265 ounce Ag."

Again, page 583:

"From Table IV the average of ten specimens assayed for silver is found to be 0.2773 ounce per ton, or, rejecting the richest of these ten specimens as above the normal, the average of the remaining nine specimens is 0.0265 ounce silver per ton of pyritiferous porphyry."

On page 580 Professor Emmons calls attention to a larger concentration of mineral at the jointure planes of the rock:

"Both pyrite and galena are occasionally found, however, coating the jointing planes of the rock, in which case they are undoubtedly secondary."

We copy from Table IV, page 594:

"23—Pyr. por., shaft W. of Tribune, Breece hill, 2.533 Ag. No Au.
"24—Pyr. por., Hartford shaft, Breece hill, 0.08 Ag. Trace Au.
"25—Pyr. por., Montana shaft, Breece hill. 0.013 Ag. Trace Au.
"28—Pyr. por., So. Fork, White's gulch, 0.033 Ag.
"29—Pyr. por., Comstock tunnel, White's gulch, 0.033 Ag.
"34—Pyr. por., Rebel Warrior shaft, Ball Mt., 0.023 Ag."

The assays presented by appellees from their veins were as follows:

No. 1—Vein No. 4, no Ag.; 0.13 Au.
No. 2—Vein No. 4, 0.04 Ag.; 0.11 Au.

No. 3—Vein No. 3, trace Ag.; 0.09 Au.
No. 4—Vein No. 2, 0.5 Ag.; 0.02 Au.
No. 5—Vein No. 1, 0.5 Ag.; 0.01 Au.

Another assay introduced by them, but not proved as connected with a vein or lode, was 7 oz. Ag.; .03 oz. Au.

The latter assay and the best one presented by appellees was sworn to as coming from that drift at six feet from the shaft. It was permitted to go to the jury over the objection of appellants, with the understanding that, as stated by the court (R., fol. 216, p. 130):

"The COURT: With the understanding that it is to be connected with a lode in rock in place it will be admitted."

This error was material and assignment of error No. 26 in the trial court (R., fol. 363, p. 222), being to the giving of instruction No. 4, based upon it, asked by the defendant in error below, where the date of the assay card admitted in evidence, March 10, 1894, is made the basis of their discovery.

On pages 134–135 (R., fols. 222, 223), the photograph of map made by Max Boehmer, are displayed all the veins Mr. Boehmer could find. In his testimony he says he found a vein four feet from the shaft about two or three inches thick. John R. Curley states that vein was "a short distance from the shaft, perhaps two or three feet, probably an inch and a half to two inches and a half wide."

S. W. Mudd states:

"About four feet from the shaft, there was a vein crossing the drift at right angles and dipping to the southwest."

J. F. McDonald states:

"At a point four feet from the side of the shaft is a vein cutting across at nearly right angles, from one to two inches thick."

There was no testimony as to what existed at any point from a point four feet from the shaft to a point fifteen or sixteen feet from the shaft. Now, skilled experts like Mr. Mudd and Mr. Boehmer, who can find veins as small as from one-fourth of an inch to one-half of an inch in size in blank porphyry, are not going to miss a vein at six feet from the shaft which seemed to assay fourteen or fifteen up to thirty and forty times what they could find in the immense veins they testified to.

To cut it short, the admission of that assay card was material error, and undoubtedly influenced the jury, and the instruction based on the date of the card—No. 4, March 10, 1894—should not have been given to the jury. This evidence ought to have acted as a boomerang to the defendant's case. If it proves anything, it proves that the red porphyry in that drift has more gold and silver contents than the small cleavages, jointure planes, and slips and seams in the porphyry which the defendant's experts searched and researched, assayed and reassayed, sampled and resampled, and then could get but a trifle better returns than Professor Emmons secured from the raw pyritiferous porphyries, and in his report he takes pains to state that his samples did not come from the jointure planes and cleavage planes of the porphyries. If the court will study the cross-examination of Messrs. Boehmer and Mudd, they will discover that the drift is cracked and broken from end to end with slips and cleavage planes, and that when boiled down it is only a blind porphyry drift from end to end.

We did not intend to refer to the erroneous rulings of the trial court so overwhelmingly in the favor of defendant in error, but the counsel having referred to this branch we felt called upon to reply.

Respectfully submitted.

GEORGE R. ELDER,
Attorney for Plaintiffs in Error.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1904.

Supreme Court
FILED
FEB 20 1905
JAMES H. McKENNEY,
Clerk

No. 185.

SAMUEL McMILLEN, RONALD MORRISON AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES CAVENDER,
JOHN A. EWING,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 185.

SAMUEL McMILLEN, RONALD MORRISON AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an adverse suit brought by plaintiffs in error against the defendant in error in the District Court of Lake County, Colorado, under Section 2326 United States Revised Statutes, to determine the question of the right of possession to certain mining ground, the plaintiff in error claiming title to said ground as the Eulalia lode mining claim, and the defendants in error claiming title to substantially the same ground as the Golden Rod lode mining claim. The case was tried before the court and a jury, resulting in a verdict and judgment in favor of defendant in error (R., 2-3), which

judgment was affirmed by the Supreme Court of Colorado (R., 224), with denial of petition for rehearing (R., 243).

Plaintiff in error claims title to the Eulalia lode

> "By virtue of a full compliance by themselves and "their grantors with the laws of the United States "and the State of Colorado, and the local laws and "rules of miners in the California Mining District "by pre-emption, discovery, location, purchase, and by "actual prior possession as a lode mining claim located "upon the public domain of the United States, and by "relocation and appropriation of the said premises "as an abandoned and forfeited claim in accordance "with the laws of the United States and of the State "of Colorado;" such claim being set up by plaintiffs in error in their amended complaint. (R., 7).

Defendants in error, in their cross complaint (R., 12), claim title to the Golden Rod lode mining claim by virtue of compliance with the laws of the United States and of the State of Colorado.

On the trial the Court instructed the jury (R., 15-16) in the following language:

> "To make a valid location of a mining claim, a citi- "zen of the United States, or one who has declared his "intention to become such, must enter upon the un- "occupied, unappropriated and unclaimed mineral do- "main of the United States, and discover within the "limits of the claim located, a vein, lode, lead or de- "posit of mineral bearing rock in place, and substan- "tially comply with the following requirements:
>
> "1st. Sink a discovery shaft upon the lode to the "depth of at least ten feet from the lowest part of the "rim of such shaft at the surface, or deeper if neces- "sary, to show a well defined crevice.
>
> "2d. Post at the point of discovery on the surface, "a plain sign or notice, containing the name of the "lode, the name of the locator and the date of dis- "covery.

"3rd. Mark the surface boundaries of the claim by "six substantial posts hewed or marked on the side or "sides which are in toward the claim and sunk in the "ground, to wit, one at each corner and one at the "center of each side line.

"4th. Within three months of the date of discovery, "record the claim in the office of the recorder of the "county in which such lode is situated, by a location "certificate which shall contain, first, the name of "the lode; second, the name of the locator; third, the "date of location; fourth, the number of feet claimed "on each side of the center of the discovery shaft; "fifth, the general course of the lode as near as may "be, and such a description of the lode as shall serve "to identify the claim with reasonable certainty; or "if a discovery shall be made within the boundaries "of the claim at any time after the staking and re- "cording, by the locators or their grantees, such dis- "covery will relate back to the original location, pro- "vided there are no intervening rights acquired by "others."

Plaintiffs in error requested the Court to instruct the jury as follows (R., 20-21):

"To make a valid location of a mining claim, a citi- "zen of the United States, or one who has declared "his intention to become such, must enter upon the "unoccupied, unappropriated, and unclaimed min- "eral domain of the United States, and discover within "the limits of the claim located a vein, lode, ledge or "deposit of mineral bearing rock in place, and sub- "stantially comply with the following requirements:

"First. Sink a discovery shaft upon the lode to "a depth of at least ten feet from the lowest part of "the rim of such shaft at the surface, or deeper if "necessary to show a well defined crevice.

"Second. Post at the point of discovery on the sur- "face a plain sign or notice containing the name of

"the lode and the name of the locator and the date "of discovery.

"Third. Mark the surface boundaries of the claim "by six substantial posts hewed or marked on the side "or sides which are in towards the claim and sunk in "the ground, to wit, one at each corner and one at the "center of each side line.

"Fourth. Within three months of the date of dis- "covery record the claim in the office of the recorder "of the county in which said claim is situated by a "location certificate which shall contain:

"First. The name of the lode.

"Second. The name of the locator.

"Third. The date of the location.

"Fourth. The number of feet claimed on each side "of the discovery shaft.

"Fifth. The general course of the lode as near as "may be, and such a description of the same as shall "serve to identify the claim with reasonable cer- "tainty."

The instruction just quoted from, asked by the plaintiffs in error, was refused by the Court, but if given would have been simply a repetition of the instruction already given.

By the request for the instruction last quoted, made by plaintiffs in error at the trial, and by their failure to except to the instruction given, which declares the steps to be taken and things to be done to make a valid location of a lode mining claim in Colorado, it appears beyond question that plaintiffs in error in the trial court did not in any manner challenge the validity of the statute of Colorado concerning the location of lode mining claims, as appears in Sections 3150 and 3152 of Mills Annotated Statutes of Colorado, which sections read as follows:

"3150. The discoverer of a lode shall, within three "months from the date of discovery, record his claim "in the office of the recorder of the county in which

"such lode is situated, by a location certificate which "shall contain:

"First. The name of the lode.

"Second. The name of the locator.

"Third. The date of location.

"Fourth. The number of feet in length claimed on "each side of the center of discovery shaft.

"Fifth. The general course of the lode as near as "may be."

"3152. Before filing such location certificate the "discoverer shall locate his claim by:

"First. Sinking a discovery shaft upon the lode to "the depth of at least ten feet from the lowest part of "the rim of such shaft at the surface, or deeper, if "necessary, to show a well-defined crevice.

"Second. By posting at the point of discovery on "the surface a plain sign or notice, containing the "name of the lode, the name of the locator, and the "date of discovery.

"Third. By marking the surface boundaries of the "claim."

Plaintiffs in error claim to have located their claim on May 30, A. D. 1893, the location having been made by one John Kennedy. The location certificate was recorded on June 17, 1893 (R., 89-98). From the location certificate it appears that they claimed 150 feet on each side of their discovery shaft in width, and 425 feet running south 77° 30′ east from center of discovery shaft, and 1,075 feet running north 77° 30′ west from center of discovery shaft.

By plaintiffs' exhibit No. 22 (R., 86), the location of the so called discovery shaft can readily be seen as being much nearer the easterly end of the claim than the westerly. By reference to the same exhibit, what was known as the Pocket Liner Shaft, in which they claim there was a discovery of mineral in 1879, appears to be at least 800 feet westerly from their so-called discovery shaft. It appears also from the evi-

dence that the only discovery stake that was ever erected by plaintiffs in error was at the discovery shaft near the easterly end, and at least 800 feet away from the so-called Pocket Liner Shaft, and the only location certificate that was ever filed by them appears in exhibit 23 (R., 89), which claimed the discovery shaft referred to on exhibit 22 as the point where a discovery had been made, although it is admitted by plaintiffs in error that no discovery of mineral was ever made in said so-called discovery shaft, their contention being that John Kennedy, who located the claim in 1893, was the agent of one Samuel McMillen, one of the plaintiffs in error (who is now deceased), and that Samuel McMillen knew that in 1879 or in 1880 mineral had been discovered in the Pocket Liner shaft; and that, therefore, the knowledge of McMillen, and the setting of the stake 800 feet away from the said shaft, and marking the boundaries as provided for by law, constituted a complete and perfect location.

No evidence was offered to show that McMillen knew of the discovery in 1879 or 1880, as the record fails to show that Mr. McMillen was offered as a witness, and it does not appear from the evidence offered that plaintiffs in error ever made any claim by notice on their discovery stake or in their location certificate that they claimed or adopted the former discovery which had been made in the so-called Pocket Liner shaft as the discovery upon which the attempted location of the Eulalia location was based; but, on the contrary, it appears from the evidence that the location of Kennedy was based upon a so-called discovery shaft more than 800 feet distant therefrom, and which showed no mineral and was sunk only in the wash upon the mountain side.

Defendant in error claims by virtue of a discovery made in what has been termed the Pocket Liner shaft on or about the 8th day of March, 1894, as appears by the testimony of

John King (R., 128-30), and which discovery was claimed by the defendant in error in its second amended location certificate, recorded March 8, 1895 (R., 181), although defendant in error had been in possession of the shaft, in which plaintiffs in error claim there was a discovery in 1879 or 1880, from about January 30, 1894.

Plaintiffs in error did not claim or establish on the trial that they had ever made a discovery within the boundaries of their Eulalia which was adopted by them, either by staking or by reference in the record of the claim. They contend that a discovery was made through the Little Vinnie claim some time between September and December, 1894, but offer no evidence that they had ever, by any act, adopted such discovery. Defendant in error's discovery had been made long prior to that time, and defendant in error adopted its discovery in the Pocket Liner shaft by filing its second amended location certificate on March 8, 1895. Plaintiffs in error have never adopted the discovery in the Pocket Liner shaft, either by staking or by recording, nor have they adopted the alleged discovery through the Little Vinnie shaft, either by staking or recording.

Defendant in error contends:

First. That the decision of the Supreme Court of Colorado is not reviewable by this court:

(a) Because there was no ruling in the cause adverse to or in contravention of any express right, title, privilege or immunity of plaintiffs in error under Section 2320 of the Revised Statutes of the United States, or any denial of or against any title, right, privilege or immunity claimed by plaintiffs in error under the statutes or laws of the United States.

(b) Because any claim made by plaintiffs in error that the statute of the State of Colorado, which requires the post-

ing of a notice at the point of discovery, is invalid, inconsistent with, repugnant to, and in contravention of, Section 2320 of the United States Statutes, was not raised at the trial in the State court, nor in the appeal to the Supreme Court of Colorado, and was raised, if at all, for the first time in the petition for a rehearing to the Supreme Court of Colorado.

Second. That no error was committed by the Supreme Court of Colorado.

Twenty-five errors are assigned by plaintiffs in error to the rulings of the Supreme Court of Colorado. The first to the fifth inclusive, the tenth, eleventh, twelfth and thirteenth, being based upon the contention of plaintiffs in error that the ruling of the Supreme Court of the State of Colorado in sustaining the judgment of the District Court of Lake County, Colorado, was in direct contravention of plaintiffs in error's express right, title, privilege and immunity to prove the existence and discovery of a vein and lode at any point or place within the surveyed and claimed limits of the Eulalia lode mining claim, regardless of where the notice containing the name of the lode, the name of the locator, and the date of the discovery was posted on the claim, or whether or not the locator had adopted and claimed the former discovery within the limits of the claim.

By reference to the assignments of error to the rulings of the District Court of Lake County upon the appeal to the Supreme Court of Colorado (R., 216-223), it clearly appears that no such point or question whatever is raised, and it was strenuously contended in the argument on appeal that the acts done and performed by the plaintiffs in error and their grantor, Kennedy, were in full compliance with the statutes of the United States, as well as with the statutes of the State of Colorado, and especially with the requirements of Section 3152 M. A. S.

In support of our contention, the Supreme Court of Colorado says (R., 227-228):

> "It is true that in tendering instructions plaintiffs "submitted one which contained the element of an "adoption by the relocator of a former discovery as "the one upon which his own location was based. "There was no error by the trial court, however, in "refusing to give this instruction, because there was "no evidence, or offer of evidence, by plaintiff that "called for it. The fact that plaintiffs' grantor knew "and claimed that there had been a former discovery "is not equivalent to, nor does it supply the place of, "its selection by him as the one on which his location "is based, particularly in the light of the declaration "in the location certificate that the discovery of the "Eulalia location was made in a discovery shaft in no "way connected with, and some hundred feet distant "from, the place where the former discovery is said to "have been made. It follows from what we have said "that plaintiffs have not brought themselves within "the doctrine they contend for, and are not in a posi-"tion to invoke its application to their case as made.
>
> "2. There is another reason for holding that plain-"tiffs may not avail themselves of that rule. It ap-"pears that they not only do not question the validity "of our State statutes, which prescribe certain acts "as necessary to a valid location, but in their com-"plaint they aver that, in the location of the Eulalia "lode, the provisions of the State, as well as of the "Federal, statutes were complied with; and among the "instructions which they themselves asked the Court "to give was one—applicable both to their own and "the Golden Rod location—in which was the declara-"tion that, as provided by Section 3152 M. A. S., a "valid location of a lode mining claim cannot be made "unless the locator sinks a discovery shaft upon the "lode discovered to a depth of at least ten feet from "the lowest part of the rim of such shaft at the sur-"face, or deeper if necessary, to show a well-defined

"crevice, and unless he posts at the point of discovery "on the surface a location stake containing certain "designated things.

"Such being true, plaintiffs certainly cannot now be "heard to say that they may at their will disregard "these mandatory provisions of State legislation "which they themselves have invoked, for, if we as- "sume their validity (which plaintiffs themselves do "not question, and which they declare they have com- "plied with), the discovery shaft must expose the vein "upon which the location of the Eulalia lode was "based, or at least one vein, and a discovery elsewhere "within the limits of the claim will not supply its "place."

In the petition for rehearing before the Supreme Court of Colorado, which petition appears in the record (229-241), if the question as to the invalidity of the statute of Colorado is raised, it is only raised by inference, and in support of that proposition the Supreme Court of Colorado, in its opinion on petition for rehearing, which petition for rehearing was supported by oral argument (R., 242), says:

"In the oral argument in support of their petition "for rehearing, counsel for appellants confined himself "to three general propositions, and to these will our "discussion be mainly devoted.

"1. That the locators of the Eulalia lode might "have availed themselves of a previous discovery "within the limits of that location, and might have "adopted the same as their own and based their lo- "cation upon it without making a valid discovery for "themselves, there can be no doubt under the authori- "ties cited in the foregoing opinion. Appellants' ar- "gument as to this point may be dismissed with the "single observation, which, in fact, has already been "made, that they did not do so. The record clearly "shows that they have not brought their case within "the principle contended for, since in their offer of

"proof they expressly rely upon mere knowledge of a "former discovery and make no pretense of having "adopted it as their own. It is apparent that appel- "lants, while right in their statement of the law, are "wrong in supposing that the facts of this case call "for the application of any such principle.

"2. Appellants again call to our attention their as- "signments of error directed against the ruling of the "trial court refusing their offer of proof of a discovery "within the limits of the Eulalia, made through the "underground workings of the Little Vinnie claim. In "the original opinion no special reference was made "to this position because the radical defects in ap- "pellants' proof as shown by their offer and by the "record, did not seem to us to call for an application "of the rules of law invoked. Further investigation, "particularly in the light of the oral arguments on "this rehearing, clearly demonstrates the fallacy of "this claim. As we have already determined, ap- "pellants' location of the Eulalia has no standing at "all, if based upon a former discovery made in 1879, "or upon the one alleged to be made in May, 1893, at "the time they went upon the ground and made their "location, and which is admitted to be in the wash "which covers the side of the mountain. At the trial, "though no such claim is made in the complaint, there "was an attempt to show a valid discovery made from "the adjoining Little Vinnie lode. When the trial "court ruled that a valid discovery could not be made "from an opening on another claim or Government "land, it was error; but in view of the facts on which "appellants themselves admit their present contention "is founded, such ruling was not prejudicial for the "reasons which we now state. If it be granted that "such a discovery was made, appellants wholly failed "to follow it up by doing the other essential things "which we said in Brewster v. Shoemaker, 28 Colo., "176, should be done in order to perfect an under- "ground discovery.

"This underground discovery is said to have been "made between the months of September and Decem- "ber, 1894. If so, we fail to see how it can avail the "appellants, for earlier in the year of 1894 the ap- "pellee, as the jury must have found, and as the evi- "dence abundantly shows, made a valid discovery in "the old Pocket Liner shaft within the present bound- "aries of the Golden Rod location. This discovery, "as well as the location based upon it, is prior to that "of appellants, whether or not the law requires in "such circumstances an amended, or additional, loca- "tion certificate to be filed. If the law does not re- "quire such filing, appellee's location of the Golden "Rod is superior to the Eulalia, for the former is first "in point of time; but if such location certificate must "be filed, still appellee must prevail, for appellants "have never filed such certificates at all, and appellee, "in March, 1895, filed its amended location certificate, "in which it bases its location upon the discovery "made in the Pocket Liner shaft. It therefore conclu- "sively follows, according to the facts as appellants "themselves on the oral argument admit them to be, "that there was no prejudicial error on the part of the "trial court in rejecting appellants' offer of proof of a "subsequent underground discovery since, if it was "made, it was not until after appellee had made a "valid discovery, and perfected its location, of the "Golden Rod."

The third proposition is one concerning the duty of the Court to send the jury to inspect the premises, which is based on a State statute, and which the Court interprets, and which construction we assume the plaintiffs in error do not contend that this Court will review.

It becomes evident from the record that no Federal question was raised by plaintiff in error, either in the trial court or in the Supreme Court of Colorado before the petition for a rehearing, and we contend that the question as to the

validity of the State statute was not raised in the State court at all.

> "A suit in a State court to try the right of posses-
> "sion to a mining claim, and the right to a patent
> "therefor, although it is brought in accordance with
> "Section 2326 of the Revised Statutes of the United
> "States, does not necessarily involve a Federal ques-
> "tion, so as to give a right of appeal to the United
> "States Supreme Court."
>
> *Bushnell vs. Crooke Mining & Smelting Co.*, 148 U. S., 682.
> *Telluride Power Transmission Co. vs. Rio Grande Western Railway Co.*, 175 U. S., 639.
> *Blackburn vs. Portland Gold Mining Co.*, 175 U. S., 571.
> *Shoshone Mining Co. vs. Rutter*, 177 U. S., 505.

The decision of the Supreme Court of Colorado in no way brought in question the validity or construction of any Federal statute. The question decided by the Supreme Court of Colorado was whether or not under the statutes of the United States, and of the State of Colorado, the plaintiffs in error had made a valid location prior to the location of the defendant in error or its grantors.

The plaintiffs in error for the first time in making their assignments of error in this court to the judgment of the Supreme Court of Colorado, challenge the validity of the State statute as found in Section 3152 M. A. S., in which the State statute requires that there be posted at the point of discovery a plain sign or notice containing the name of the lode, the name of the locator, the date of location, and the date of discovery; and contend that such provision of the State statute is inconsistent with and in contravention to Section 2320 of the Revised Statutes of the United States.

At the trial in the State court and upon appeal, plaintiffs in error always contended that they had complied with that

provision of the State statute, and in their pleadings and in the instructions asked of the Court they themselves invoke its aid, and do not, either at the trial or upon appeal, question the validity thereof or the authority of the Legislature of the State of Colorado to make and the courts to enforce.

In the case of *Roby vs. Colehour*, 146 U. S., 153, the Court uses the following language:

> "Our jurisdiction being invoked upon the ground "that a right or immunity specially set up and "claimed under the constitution or authority of the "United States has been denied by the judgment "sought to be reviewed, it must appear from the record "of the case, either that the right so set up and "claimed was expressly denied, or that such was the "necessary effect in law of the judgment."

No right or immunity was specially set up or claimed in the case at bar, and no such right was expressly or in effect denied by the judgment.

FEDERAL QUESTION RAISED TOO LATE.

Plaintiffs in error, as appears from the record, did not raise the question as to the invalidity of the State statute in the State court, if at all, until they filed their petition for a rehearing in the Supreme Court.

"It is well settled by the decisions of this court that the attempt to raise for the first time a Federal question in a petition for rehearing, after judgment, comes too late."

Loeber vs. Schroeder, 149 U. S., 580.
Texas & Pac. Ry. Co. vs. Southern Pac. Co., 137 U. S., 48.
Butler vs. Gage, 138 U. S., 52.
Winona & St. P. R. Co. vs. Plainview, 143 U. S., 371.
Leeper vs. Texas, 139 U. S., 462.
Bushnell vs. Crooke, M. & S. Co., 148 U. S., 682.

Which rule is again affirmed by this court in the case of *Sayward vs. Denny*, 158 U. S., 180, in which Mr. Chief Justice Fuller, in speaking for the Court, says:

> "As the validity of no treaty or statute of, or authority exercised under, the United States, nor of "a statute of, or authority exercised under any "State, was drawn in question, it is essential to the "maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity "under the constitution or laws of the United States "was specially set up or claimed in the State court, "and that the decision of the highest court of the "State, in which such decision could be had, was "against the title, right, privilege, or immunity so "set up or claimed. And in that regard, certain propositions must be regarded as settled: (1) That the "certificate of the presiding Judge of the State court, "as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below. *Powell vs. Brunswick Co.*, 150 U. S., 433, 439 "and cases cited. (2) That the title, right, privilege, or "immunity must be specially set up or claimed at the "proper time and in the proper way. *Miller v. Texas*, "153 U. S., 535; *Morrison v. Watson*, 154 U. S., 111, "115, and cases cited. (3) That such claim cannot "be recognized as properly made when made for the "first time in a petition for rehearing after judgment. "*Loeber v. Schroeder*, 149 U. S., 580, 585, and cases "cited. (4) That the petition for the writ of error "forms no part of the record upon which action is "taken here. *Butler v. Gage*, 138 U. S., 52, and cases "cited. (5) Nor do the arguments of counsel, "though the opinions of the State courts are now made "such by rule. *Gibson v. Chouteau*, 8 Wall., 314; *Par*"*malee v. Lawrence*, 11 Wall., 36; *Gross v. Mortgage* "*Co.*, 108 U. S., 477, 484; *U. S. v. Taylor*, 147 U. S., "695, 700. (6) The right on which the party relies

"must have been called to the attention of the Court, "in some proper way, and the decision of the Court "must have been against the right claimed. *Hoyt v. "Thompson*, 1 Black, 518; *Maxwell v. Newbold*, 18 "How., 515. (7) Or, at all events, it must appear from "the record, by clear and necessary intendment, that "the federal question was directly involved, so that the "State court could not have given judgment without "deciding it; that is, a definite issue as to the posses- "sion of the right must be distinctly deducible from "the record before the State court can be held to have "disposed of such federal question by its decision. "*Powell v. Brunswick Co.*, 150 U. S., 433, 439."

Which rule has been since approved by this Court in *Pim vs. St. Louis*, 165 U. S., 273; *Miller vs. Cornwall R. Co.*, 168 U. S., 131; *Meyer vs. Richmond*, 172 U. S., 82; *Citizens' Savings Bank vs. Owensboro*, 173 U. S., 636; *Harding vs. Illinois*, No. 61, October Term, 1904, of this Court.

II.

IF THIS COURT HAS JURISDICTION, WAS THERE ANY ERROR COMMITTED BY THE SUPREME COURT OF COLORADO?

Is the statute of the State of Colorado relating to the location of mining claims, and which requires the sinking of a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show a well-defined crevice, and the posting at the point of discovery on the surface of a plain sign or notice containing the name of the lode, the name of the locator, and the date of discovery, inconsistent with Section 2320 of the Revised Statutes of the United States?

Section 2320 provides, among other things, as follows:

"A mining claim located after the 10th day of May, "eighteen hundred and seventy-two, whether located

"by one or more persons, may equal, but shall not ex
"ceed, fifteen hundred feet in length along the vein
"or lode, but no location of a mining claim shall be
"made until the discovery of a vein or lode within the
"limits of the claim located. No claim shall extend
"more than three hundred feet on each side of the
"middle of the vein at the surface, nor shall any claim
"be limited by any mining regulation to less than
"twenty-five feet on each side of the middle of the vein
"at the surface, except where adverse rights existed
"on the 10th day of May, 1872, rendering such limita-
"tion necessary. The end lines of each claim shall be
"parallel to each other."

This section has been supplemented by the Legislature of Colorado, as appears by Section 3152, Mills Annotated Statutes of Colorado, passed in 1874, in which it is required, before a valid location can be made, that a shaft shall be sunk by the discoverer upon the lode to a depth of ten feet, or more when necessary, and by posting at the point of discovery on the surface a notice, etc.

The State statute requires the sinking of the discovery shaft on the lode, not at some other point within the boundaries of the claim; it also requires the posting of the notice at the point of discovery, and not at some other point upon the claim.

It was evidently intended by the State statute to make the place where the notice of location is posted the initial point on the lode, and from which the boundaries of the claim can be determined, and it is also intended that to make a valid location of a mining claim, the locator must first discover a lode or deposit of mineral in place, and then erect thereon or in such close proximity thereto as to indicate the point selected as the place of discovery, a plain sign or notice of location containing the notice prescribed by the State statute. This question has been fully considered under

a similar State statute by the Supreme Court of Utah in the case of *Copper Globe Mining Company vs. Allman*, 23 Utah, 410, and also by the United States Circuit Court of Appeals of the Ninth Circuit, in the case of *Nevada Sierra Oil Company vs. Home Oil Company*, 98 Fed., 674, in which Judge Ross uses the following language:

> "It is also true as a matter of law that it is not "necessary that a locator should be the first discoverer "of mineral upon the land in order to make a valid "location; but he must not only have knowledge of the "former discoveries, but such actual discovery must be "adopted and claimed by him in order to give validity "to his location."

The evident purpose and intent of the State of Colorado, and the other States which have passed statutes prescribing additional regulations in respect to the location of mining claims, including the sinking of a discovery shaft on the vein, and posting a notice at the point of discovery, was to require the discoverer of a lode who undertakes to locate the same to designate the point and place at which his discovery is made, and to require him to show a well-defined crevice at that point.

This requirement of the State statute is not inconsistent with or in contravention of the United States Statute, and is simply supplementary to Section 2320. The right of the State to pass acts supplementing the mining act of Congress in respect to the location of mining claims, is recognized by Section 2324 of the Revised Statutes of the United States and the validity of such State legislation has been recognized in the cases of

Belk vs. Meagher, 104 U. S., 279;
Erhardt vs. Boaro, 113 U. S., 527;
Kendall vs. San Juan Silver Mining Co., 144 U. S., 658;

and by the State courts in

Wolfley vs. Lebanon Mining Co., 4 Colo., 112;
O'Donnell vs. Glenn, 8 Mont., 248;
Metcalf vs. Prescott, 10 Mont., 283;
Purdum vs. Laddin, 23 Mont., 387;
Sissons vs. Sommers, 24 Nev., 379;
Copper Globe Mining Co. vs. Allman, 23 Utah, 410;
Northmore vs. Simmons, 38 C. C. A. 211, 97 Fed., 386;

and by this court in the opinion of Mr. Justice Brewer in the case of *Butte City Water Co. vs. Ben Baker*, No. 109, October Term, 1904, in which the following language is used:

> "The Montana statute (Montana Codes Annotated, "Sec. 3612), among other supplementary regulations, "provided that the declaratory statement filed in the "office of the clerk of the county in which the lode or "claim is situated must contain 'the dimensions and "'location of the discovery shaft, or its equivalent, "'sunk upon the lode or placer claims,' and 'the loca-"'tion and description of each corner, with the mark-"'ings thereon.' A failure to comply with these regu-"lations was the ground upon which the Supreme "Court of Montana held the location invalid. It is "contended that these provisions are too stringent, "and conflict with the liberal purpose manifested by "Congress in its legislation respecting mining claims. "We do not think that they are open to this objection. "They certainly do not conflict with the letter of any "Congressional statute; on the contrary, are rather "suggested by Sec. 2324. It may well be that the "State Legislature, in its desire to guard against false "testimony in respect to a location, deemed it import-"ant that full particulars in respect to the discovery "shaft and the corner posts should be at the very be-"ginning placed on record. Even if there were no "danger of false testimony, it was not unreasonable "to guard against the resurrection of incomplete loca-"tions when by subsequent explorations mining "claims of great value have been uncovered."

The foregoing, from the opinion of this Court, seems to be particularly applicable to the case at bar. The section of the Montana code requiring the dimensions and location of the discovery shaft to be contained in the location certificates, is surely as inconsistent with and as much in contravention of the United States statute as the requirements of the Colorado statute, that a notice be posted at the place of discovery and that a disclosure of the vein be made in the discovery shaft at the point where such notice is posted.

Plaintiffs in error wholly failed to make a discovery in the shaft at which their notice was posted, and wholly failed, even if it be assumed that McMillen had knowledge of a vein in the Pocket Liner shaft, to adopt or claim such discovery as the discovery upon which the location of the Eulalia claim was based until long after the intervening rights of defendant in error had been fully perfected.

We submit that if the decision of the Supreme Court of Colorado is reviewable, its judgment was right, and should be affirmed.

Respectfully submitted,

CHARLES CAVENDER,
JOHN A. EWING,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 185.—October Term, 1904.

Samuel McMillen et al., Plaintiffs in Error, vs. The Ferrum Mining Company. } In error to the Supreme Court of the State of Colorado.

[April 3, 1905.]

By this writ of error it is sought to review a judgment of the Supreme Court of Colorado, affirming a judgment of the District Court of Lake County in favor of the Ferrum Mining Company in a proceeding brought by the plaintiffs in error under R. S. Sec. 2326 to determine the right of possession to certain mining grounds, plaintiffs claiming title as owners of the Eulalia Lode Mining claim and the defendants claiming title to the same ground as the Golden Rod Lode Mining claim.

The case was tried before the Court and a jury, resulting in a verdict and judgment in favor of the defendants, which was affirmed by the Supreme Court, upon the ground that plaintiffs had not complied with either the Federal or the State statutes, in showing a valid discovery of mineral in their location.

Mr. Justice Brown delivered the opinion of the Court.

In their amended complaint the plaintiffs averred that in the location and record of the Eulalia Lode Mining claim their grantor had complied with the laws of the United States, the laws of Colorado and the rules and regulations of miners in the District, with reference to the discovery, location and appropriation of said Eulalia Mining claim. They did not question the validity of the State statutes, which prescribe certain acts as necessary to a valid location, but set up a compliance with them, and contended that the defendant did not establish a valid location.

Plaintiffs did not claim by virtue of a discovery of their own, but by virtue of their knowledge of the existence of a vein within the surveyed limits of that claim, though several hundred feet distant from the discovery shaft of the Eulalia, which he, McMillen, together with his co-owner, had previously discovered in the process of its development; and insisted that this knowledge was equivalent to an actual discovery by him of a vein within the Eulalia location.

The proposition of plaintiffs, as stated by their counsel, was this:

"That Mr. McMillen, as an owner and a locator of the Eulalia Lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he in company with the co-owners of the Pocket Liner

claim had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground, claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc., etc., etc."

The substance of the plaintiff's argument was that the mere knowledge of the Eulalia locator of the existence of a vein in the Pocket Liner, the previous lode, made his location valid, provided he performed the other things requisite under the statutes of the State of Colorado, besides the actual discovery of mineral. The Court did not deny the proposition that, if the locator knew that there had been a discovery of a vein or lode within his location, he might base his location upon it, although he made no discovery himself; but the statutes of Colorado provide (Mills Annotated Statutes, Section 3152) certain requirements in addition to those specified in the Revised Statutes, among which were that the discoverer before filing his location certificate shall sink a discovery shaft to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice, and shall also post at the point of discovery a notice containing the name of the lode, the name of the locator, and the date of the discovery, and shall also mark the surface boundary of the claim. The Court further held that where "the locator himself selects the discovery shaft, as the one in which the discovery of mineral has been made, and there posts his location stake, and bases his location upon such discovery, he may not, after intervening rights have attached, abandon and disregard the same, neglect to comply with such provisions, and select another discovery upon which his location was not predicated."

In this connection the Court held that if the plaintiffs relied upon a former discovery they were bound to show that it was claimed by their locator, or adopted by him as the only one upon which the Eulalia Lode was made; and that the Court was correct in refusing to hear the proof offered, since it did not meet the requirements of the decisions, to the effect that a former discovery may be made the basis of a valid location. The Court, however, found expressly that the plaintiffs not only did not question the validity of the State statutes, which prescribe certain acts as necessary to a valid location, but averred in their complaint that those statutes had been complied with.

After the disposition of the case by the Supreme Court, plaintiffs in error filed a petition for a rehearing, in which, for the first time, they raised the question that, as there had been upon their part a full compli-

ance with the requirements of R. S. Sec. 2320 before any valid adverse rights had intervened, there was a perfect and complete appropriation of this ground, and that court should have so adjudicated. In its opinion the Court reiterated what it had previously said, that, admitting that the plaintiffs might have availed themselves of the previous discovery within the Eulalia location, and adopted the same as their own without making a valid discovery for themselves, they had not brought themselves within this principle, since in their offer of proof they merely relied upon a former knowledge of such location. In its opinion the Court made no mention of the Federal question, which does not seem to have been pressed upon their attention. Though unnecessary to our decision a recent case upon this subject is instructive. (*Butte City Water Co.* v. *Baker*, 196 U. S. 119.)

It is sufficient for the purposes of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. This was obviously too late, unless at least the Court grants the rehearing and then proceeds to consider the question. (*Mallett* v. *North Carolina*, 181 U. S. 589; *Loeber* v. *Schroeder*, 149 U. S. 580; *Miller* v. *Texas*, 153 U. S. 535.)

In both courts the question was treated as one of local law, and the mere fact that suit was brought under R. S. Sec. 2326 to try adverse rights to a mining claim, does not necessarily involve a Federal question, so as to authorize a writ of error from this Court. (*Bushnell* v. *Crooke Mining Co.*, 148 U. S. 682; *Telluride Power Co.* v. *Rio Grande Ry. Co.*, 175 U. S. 639; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.)

The writ of error is accordingly dismissed.

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Clerk Supreme Court, U. S.